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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, ET AL.,
PETITIONERS,

v.

ARTHUR FANO, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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BRIEF OF THE PETITIONERS

Opinions Below

The opinion of the District Court, *Fano* v. *Meachum*, is reported at 387 F. Supp. 664 (D. Mass., 1975). The opinion of the Court of Appeals for the First Circuit was issued June 27, 1975 and is reported at F.2d . Both opinions are included as an Appendix to this petition.

Jurisdiction

The petitioners invoke the jurisdiction of this court pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether a prison inmate who is transferred, within a state, from a medium security institution to a maximum security institution, when there is no imposition of disciplinary punishment at the receiving institution, is entitled under the Due Process Clause of the Fourteenth Amendment to more than a notice of the proposed transfer and an opportunity to be heard in opposition to the transfer.
2. Whether the Commonwealth of Massachuetts has sufficiently created an interest in remaining in any one prison to be cognizable as "liberty" or "property" under the Fourteenth Amendment.
3. Whether the Due Process Clause of the Fourteenth Amendment requires the disclosure of informant information when, in the judgment of prison officials, such disclosure would create a substantial likelihood of harm to the informants.
4. Whether the opinion of the Court of Appeals for the First Circuit is consistent with opinions of this Court.

Statement of the Case

A. *Prior Proceedings.*

This action was originally commenced by seventeen inmates of MCI, Norfolk, a medium security institution within the Commonwealth of Massachusetts. Plaintiffs sought declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1933. Six inmates later filed an

amended complaint and sought preliminary injunctive relief ordering their transfer from MCI, Norfolk to the maximum security institution at MCI, Walpole, rescinded. The preliminary injunction was heard by the District Court upon a stipulation of facts entered into by the parties and upon a submission of documents pertinent to the transfer. On January 10, 1975, the District Court issued an order, Appendix 23, granting certain injunctive relief against the prison officials. The order of the District Court was stayed in part by the District Court pending an appeal to the Court of Appeals for the First Circuit. Pending the appeal, the Court of Appeals stayed the remainder of the order because of the seriousness and complexity of the issues involved.

On June 27, 1975 the Court of Appeals, in a 2 to 1 decision, Judge Levin H. Campbell dissenting, affirmed the order of the District Court. The Court of Appeals stayed issuance of the mandate pending the filing and disposition of a petition for Certiorari with this Court.

B. *Facts*

There was no essential dispute as to the facts of this case. The critical incidents which comprise the complaint were set forth in a stipulation and are fairly stated in the opinion of the courts below.

From the late summer through the fall of 1974, there was a period of serious unrest at MCI, Norfolk, a "medium security" institution in the Commonwealth of Massachusetts. This period of unrest included nine fires within the institution serious enough to require the summonsing of fire departments from the neighboring communities. Prison officials believed that these fires were set by individuals within the institution. The petitioner Meachum, Superintendent of MCI, Norfolk, received confidential information

that certain inmates, among whom are the respondents in this action, were in some degree responsible for this unrest and for the fires occurring at the institution. Between October 16, and October 24, 1974, respondents in this action were taken from the general population MCI, Norfolk and placed in cells at the Receiving Building at Norfolk. The Receiving Building at Norfolk, was both a place apart from the general population and a place of stricter confinement than the general population.

On October 25, each of the inmates was given a disciplinary report purporting to describe the reasons of their removal from the general population. On November 4, 1974, the prisoners received notice of a classification hearing. The notice essentially repeated the matters earlier referenced in the disciplinary report and informed the inmates that a "classification hearing" would be held on a date to immediately follow. The notice of the classification hearing of the respondent Fano is included in the appendix as representative of the notices given to respondents. (App. 24) Certain of the respondents were given different notices but the substance of the notification procedure is represented by the document contained in the appendix. On November 6, 8, 11, and 13, 1974 classification hearings were held for each of the inmates on the information referenced on the notices. At the hearing, each inmate was present and allowed to make a personal statement to the board. Each inmate was represented by counsel. Each inmate was allowed to present evidence in his behalf and, indeed, the stipulation that was before the District Court and the Court of Appeals indicates that several of the prisoners, at least, produced corrections officers, who testified in their behalf. The Classification Board also heard evidence from each of the plaintiff's social workers during the course of the hearing.

The Classification Board opened the hearing by reading a prepared statement. Following the statement plaintiff and his attorney were asked to excuse themselves from the hearing room. Meachum then presented the board informant information which he had received along with a record of prior instances in which the informants' information had proven reliable. The superintendent's testimony was not taken under oath and the board specifically refused to tape-record the parts of the testimony dealing with the confidential information. The remainder of the hearings were tape recorded and made part of the institutional record. Following the return of the inmate and his counsel to the hearing room, the board informed him that the Superintendent had given informant information relating to the inmate's conduct at the institution. The board refused to further summarize the evidence because, in Meachum's, and the board's opinion, to do so would endanger the safety of the informants. Each plaintiff was, as noted earlier, allowed to present evidence to the board and to make any statement they wished to the board concerning their activities in the institution. Each plaintiff denied to the board any of the activity alleged in the disciplinary classification reports.

The board, however, basing its decision on Meachum's testimony, and the information supplied by Meachum, recommended transfers from Norfolk for all of the inmates. It was stipulated that the inmates were not given a written statement of the reasons for the board's action, but were rather orally informed by the board that its recommendations were based upon the informant information presented to it by the Superintendent. The parties also stipulated that the recommendations made by the board were essentially ratified by the Commissioner, though in some instances the recommendations were modified with respect to the receiving institution.

Following the Commissioner's approval, the inmates were transferred to the maximum security institution at Walpole. Walpole and Norfolk are approximately one mile apart. The inmates were subjected to no disciplinary punishment upon transfer to Walpole. They suffered no loss of good time and were not placed in administrative segregation upon their arrival. The inmates might be furloughed and paroled from the institution at Walpole, although it was conceded that the requirements were generally stricter at Walpole than at Norfolk.

Reasons for Granting the Writ

Introduction

The petitioners' ask this Court to grant a petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit on essentially three grounds: (1) the opinion of the court in the case below is inconsistent with opinions of this Court both in the Court of Appeals' failure to apply the "Entitlement Doctrine" to the facts of this case as well as its failure to specifically and accurately analyze the nature of protected interests asserted by the state prisoners; (2) the question of a state prisoner's interest in remaining in any one institution, and his interest in being free from notations on his institutional record, are serious and substantial constitutional questions encompassing both the liberty and property clauses of the Fourteenth Amendment; and (3) the lower federal courts are in disarray on these issues.

Since this Court's opinion in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) the lower federal courts have been dealing with the application of the concept of procedural due process to many and varied factual situations in prisons. The most ripened and specific questions which have arisen from the application of the principles of *Wolff* v. *McDon-*

nell, supra, have occurred in the area of intra-state transfers of state prisoners. This petition presents substantially similar questions as those presented by the case of *Preiser* v. *Newkirk,* U.S. , (June 25, 1975), *vacating and remanding, Newkirk* v. *Butler,* 499 F.2d 1214 (2nd Cir. 1974). The most substantial difference between the instant petition and *Preiser* v. *Newkirk, supra,* is that this case presents no issue of mootness. The instant petition is also similar to the case of *Haymes* v. *Montayne,* 505 F.2d 977 (2nd Cir. 1974), *cert. granted,* U.S. (June 30, 1975).

The instant petition also presents issues not presented by either of the aforementioned Second Circuit cases. This petition seeks to have this Court resolve whether or not the lower court was in error when it enjoined the transfer of individual inmates, who had been identified by the superintendent of the transferring institution as responsible for setting of fires and other disruptive activity at the institution. The petition seeks to have this Court determine whether or not the Court of Appeals was in error when it required the petitioners to give the prisoners a summary of the information that was before the hearing board when, in the judgment of the prison officials, such a summary would have served to identify informants and would have, consequently, placed the informants' lives in danger.

I. The Opinion of the Court of Appeals Is in Conflict With Decisions of This Court.

The petitioners suggest that the Court of Appeals has misread one of the fundamental precepts used in determining whether or not the Fourteenth Amendment is to be considered applicable to a particular situation. Petitioners contend that it has long been the law that in determining ". . . whether due process requirements apply in the first

place, we must look not to the 'weight' but to the *nature* of the interest at stake". *Goss* v. *Lopez,* 419 U.S. 565 (1975) (preliminary print). However, the Court of Appeals, in its resolution of the question of whether due process was to apply, did not look, at least initially, to the nature but began by assessing the weight of the interests involved.

> "The question thus becomes one of whether the detriment worked by an intra-state transfer from a medium-security institution to a maximum-security prison is *serious enough* to trigger the application of due process protections."

(App. 32) (emphasis supplied).

It is apparent from this quote that the Court of Appeals was weighing the losses asserted by the prisoners rather than analyzing the nature of the interests claimed. This was incorrect.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendments' protection of liberty and property." *Board of Regents* v. *Roth,* 408 U.S. 564, 569 (1972). In making the initial determination of whether the interest is, in fact, encompassed by the Fourteenth Amendment, it is not the weight of the interest that is crucial to the decision but rather the nature of the interest. *Board of Regents* v. *Roth* at 571. The distinction between "liberty" and "property" may often be an obscure one, particularly in the prison context, but, the Court of Appeals, in determining the instant case, made no threshold effort to determine whether or not the interests asserted by the state prisoners were in effect in the nature of liberty or property interests encompassed by the Fourteenth Amendment. Rather, the Court cumulated the deprivations asserted by the prisoners and held the weight of the deprivations asserted was sufficient

to trigger the procedural protections demanded by the Fourteenth Amendment.

Moreover, in failing to initially analyze the specific nature of the interests asserted by the prisoners the Court of Appeals is further in conflict with decisions of this Court. "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss* v. *Lopez, supra* at 573, citing *Board of Regents* v. *Roth,* at 577. The Court of Appeals presumed that the rights that the individual prisoners were asserting in the case below were rights which the constitution itself protected. This assumption, the petitioners contend, is not correct; and it is in conflict with decisions of this Court.

> "*Morrissey* v. *Brewer,* 408 U.S. 471 (1972), applied the limitation of the Due Process Clause to governmental decisions to revoke parole, *although a parolee has no constitutional right to that status.* In like vein was *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good time credits accumulated under state law, *although those benefits were not mandated by the constitution.*"

Goss v. *Lopez,* 419 U.S. at 573. (emphasis supplied)

As the vigorous dissenting opinion of Judge Campbell makes vividly clear, in deciding whether or not a prisoner's interest is either a liberty or property interest encompassed by the Fourteenth Amendment ". . . it should be recognized that Massachusetts has not conferred a statutory right upon inmates to be in one institution rather than another." The majority opinion of the Court of Appeals rejected the

distinction set out by Judge Campbell. The Court expressly declined to address the issues in terms of the possible creation of the interest by the State.

The interests asserted by the prisoners in this action do not constitute a "legitimate claim of entitlement" to any benefits protected by the Fourteenth Amendment. See *Board of Regents* v. *Roth, supra,* at 577; *Arnett* v. *Kennedy,* 416 U.S. 134, 165 (1974), (concurring opinion of Mr. Justice Powell). In the instant petition there are absolutely no statutes, regulations, or factual patterns which can be said to constitute any claim of entitlement to remain in or to go to, any specific institution in the Massachusetts prison system. The greatest inconsistency of the Court of Appeals with the decision of this Court is not in defining the nature of the interest but, rather, in failing to make any analysis whatsoever, as to whether or not a claim of entitlement exists to the continuation of the benefit or interest asserted by these prisoners. See Judge Campbell's perceptive analysis at App. 38 n. 2. Certiorari should be granted to correct these conflicts.

II. The Lower Federal Courts Are in Conflict on the Issues Presented Here.

As noted above, since the decision of this Court in *Wolff* v. *McDonnell,* 418 U.S. 539 (1974) the lower federal courts have been faced with the difficulty of applying the concept of procedural due process to many and varied factual situations arising in the prison context. The decision of the lower federal courts in applying the concepts of procedural due process have produced conflicting results, particularly in the area of transfers of individual prisoners from one institution to another. This conflict is reflected specifically by the dissent of Judge Campbell from the majority opinion of the Court of Appeals. (App. 37). The granting of Certiorari by this Court in the cases

arising out of the Second Circuit, *Newkirk* v. *Butler,* 499 F.2d 1214 (2nd Cir. 1974), *vacated and remanded* U.S. (June 25, 1975) and *Haymes* v. *Montayne,* 505 F.2d 977 (2nd Cir. 1974) *cert. granted* U.S. (June 30, 1975) reflect an implicit recognition by this Court that the issues present here are of consequence.

Decisions involving the intra-state transfer of prisoners have produced widely conflicting results. *Compare, Schumate* v. *People of the State of New York,* 373 F. Supp. 1166 (S.D.N.Y. 1974) with *Beatham* v. *Manson,* 369 F. Supp. 783 (D. Conn. 1973). Some courts have held that transfers between state penal institutions are entirely a matter of administrative discretion. See *Benfield* v. *Bounds,* 363 F. Supp. 160 (E.D.N.C. 1973). In *Bundy* v. *Cannon,* 328 F. Supp. 165 (D. Md. 1971) the presence of different custody levels was not seen to require due process although the Court did hold that placement in segregation at the receiving institution would be sufficient to mandate procedural protection. See also, the concurring opinion of Judge Campbell in *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973), *vacated and remanded,* 418 U.S. 909 (1974), *aff'd in part,* 510 F.2d 537 (1974), wherein Judge Campbell indicated his concurrence with the majority of the Court of Appeals only insofar as it was explicitly understood that the procedural protections referred to by the majority were not to be construed as applying to wholly intra-state situations.

In *Newkirk* v. *Butler, supra,* the Second Circuit required process when the custody level of the institution was being changed. The *Newkirk* Court appeared to have determined that there was an inherent deprivation in intrastate transfers sufficient to require procedural protections. *See also, White* v. *Gilman,* 360 F. Supp. 64 (S.D. Iowa 1973). *Stone* v. *Egeler,* 377 F. Supp. 115 (W.D. Mich. 1973).

There are cases, however, which hold that interstate transfers of state and federal prisoners do not necessarily require due process procedures. *Fajeraik* v. *McGinnis*, 493 F.2d 468 (9th Cir. 1974); *Hillen* v. *Director*, 455 F.2d 510 (9th Cir. 1972), *cert. denied* 409 U.S. 989 (1972). Many courts considering the question of intrastate transfers have required varying degrees of due process procedures. See *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Ore. 1973) as well as *Gomes* v. *Travisono, supra.*

The conflicting decisions of the lower federal courts on the question of whether or not procedural protections are constitutionally required when intrastate transfers of prisoners are involved is an issue that can be resolved only by this court. Involved are questions which implicate both the power of the federal court to affect the administration of state prison systems as well as a state inmate's general right to protection of "liberty" interests. The issues comprehend both federalism and considerations of judicial discretion.

As stated by Judge Campbell:

> "Where within the state penal system a prisoner is to be lodged seems to me a judgment which the state has the exclusive right to make—summarily if need be. Such decisions are part and parcel of its power to keep the prisoner safely, to protect other prisoners, and to operate its prisons." (App. 39)

In the instant case these issues are especially paramount. The plaintiffs in the case below were transferred from the institution at MCI, Norfolk, because, in the judgment of the Superintendent, as the result of information supplied to him by an informant, they had been responsible for setting fires and engaging in varying degrees of disruptive behavior at the institution. (App. 25-26). The decisions

below have required that these prisoners be transferred back to the institution, pending additional hearing procedures which the prison officials do not feel that they are able to afford, consistent with the safety of the institution and the inmates committed to their custody.

III. The Issues Raised in This Petition Are Novel and Substantial Questions Which Justify a Decision by This Court.

The Court of Appeals, both in its analysis of whether procedural protections were to apply, as well as in its resolution of what the process was to consist of, raised substantial and novel issues concerning the applicability of the Fourteenth Amendment.

The resolution of other questions by the First Circuit, however, leaves yet an additional issue which has not been presented to this court by either the cases of *Haymes* v. *Montayne, supra,* or *Preiser* v. *Newkirk, supra.* This concerns the extent of an informant's right to remain anonymous when his information is being used as a basis for administrative decisions in the prison system. In the past substantial controversy existed over the right of an inmate to confront his or her accusers and cross-examine adverse witnesses at prison disciplinary hearings. See *Meyers* v. *Alldredge*, 492 F.2d 296, 308 (3rd Cir. 1974). This controversy was substantially clarified by the decision of this court in *Wolff* v. *McDonnell, supra.* The petitioners contended in the Court of Appeals that this Court's language in *Wolff* was dispositive of what, and how much, information was required to be given to the inmate. *See,* 418 U.S. at 565, where this court said ". . . that there will be occasions when personal or institutional safety are so implicated, that the statement [of reasons] may properly exclude certain items of evidence."

The Court of Appeals rejected petitioners' contention. In doing so, we suggest, the Court of Appeals went far beyond what this Court required in *Wolff*. We suggest the Court of Appeals promulgated a general rule which may well be read to permit a subjective analysis that would permit the lower federal courts to overrule the considered judgment of prison officials in any administrative matter which occurs within any state prison system, simply because the Fourteenth Amendment is invoked.

The District Court and the Court of Appeals have required that inmates, who have been specifically found by the superintendent of the transferring institution to be dangerous and disruptive, be sent back to that institution because procedural due process was not observed. This is a significant action because it gives no indication that the demands of federalism have been recognized and there is no apparent appreciation of the responsibilities of prison officials. The decision further creates a potentially dangerous situation because administrative officials may now feel that they cannot transfer a dangerous inmate if they cannot form evidentiary support for the judgment that they feel they are otherwise bound to make. The decision of the Court of Appeals places every prison official within its jurisdiction in a dilemma by conceding nothing to administrative good faith and substantially overlooking important interests of the state. As noted by Judge Campbell in his dissent below:

> "Administrative realities may sometimes necessitate the flexibility to transfer even on the basis of demonstrably inadequate information. If, for example, the warden has narrowed the likely cause of disruption down to several inmates, he may deem it prudent to transfer all without having objective proof that all are involved. A 40% risk that an inmate will disrupt

> or set a fire may, in some circumstances, be too great to take. The safety of other inmates and prison personnel may have to be weighed against fairness to certain individuals." (App. 40-41 n. 3)

Conclusion

The issues presented by this petition are novel, complex, and are of overriding importance to the administration of the state prison systems. The complexity of the analysis which surrounds the interest of a state prisoner in his entitlement to certain rights within the prison system is of singular importance both from the viewpoint of the administrator as well as of the inmate. The necessity of deciding what is in fact the process due in potentially disruptive situations is an issue of monumental importance which can only be resolved by this Court. The question of what can be constitutionally required when informant information is being used as a basis of an administrative official's decision is fraught with danger and it has been unsatisfactorily resolved by Courts below. This Court, alone, can resolve these questions. For all of the reasons stated above the petitioners respectfully request that their application for a Writ of Certiorari be granted in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS

Civ. A. No. 74-5059-S.
ARTHUR FANO et al.,
Plaintiffs,
v.
LARRY MEACHUM et al.,
Defendants.

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OPINION AND ORDER

Jan. 10, 1975.

SKINNER, District Judge.

This petition is brought under the Civil Rights Act, 42 U.S.C., Section 1983, for declaratory, injunctive, and compensatory relief by 17 inmates of the Massachusetts Correctional Institution, Norfolk, a medium security state prison operated by the Massachusetts Department of Correction. They allege, in substance, that they have been reclassified into substantially more adverse conditions of confinement because of specific prior conduct without the due process required by the Fourteenth Amendment to the Constitution of the United States.

The complaint was filed on November 4, 1974. The plaintiff's motion for a temporary restraining order was denied without hearing on the same day.

On December 12, 1974, six of the plaintiffs, namely Arthur Fano, Richard DeBrosky, Robert Dussault, David Hathaway, Richard McPherson and Charles Royce filed an Amendment Verified Complaint on behalf of themselves and "all others similarly situated." There has been no showing which would justify the certification of this action as a class action and the Amended Verified Complaint, therefore, will be considered only with reference to the six named plaintiffs who have filed it. The same six plaintiffs (hereinafter referred to as the plaintiffs) have filed a motion for a preliminary injunction on which a hearing was held on December 20, 1974. The matter was presented on stipulations of fact, stipulated documents, and the testimony of the plaintiff Hathaway. There does not appear to be any material issue of fact.

FINDINGS OF FACT

In the fall of 1974, there was a period of unrest among the inmates of M.C.I., Norfolk. From August 13, 1974 through October 23, 1974, there were nine fires in the institution, thought to have been set, which were serious enough to require the presence of outside fire departments. In addition, there were three less serious fires, one on October 25, 1974, one on October 31, 1974, and one on November 26, 1974.

Plaintiff McPherson was taken from the general population at M.C.I., Norfolk, on or about October 16, 1974, and placed in a cell in the Receiving Building at the institution (hereinafter referred to as the RB). On October 24, the plaintiffs Fano, DeBrosky, Dussault, Hathaway and Royce were taken from the general population and placed in cells in the RB.

The RB at M.C.I., Norfolk, is apparently principally used for the processing of new inmates. In effect, it also serves as an informal Departmental Segregation Unit, though it apparently has not been officially designated as such. The conditions of confinement in the RB are roughly

comparable to those in the Departmental Segregation Unit, Cell Block 10, at M.C.I., Walpole, described in the Revised Opinion and Order in Daigle et al. v. Hall et al., CA 74-4783-S, filed January 7, 1975. No notice or hearing was afforded the plaintiffs before their transfer to the RB.

On October 25, 1974, the defendant Meachum filed and presented each plaintiff with a copy of a disciplinary report. The offenses charged against each plaintiff were described in substantially the same terms as appears in the notices of reclassification hearings hereinafter quoted. In each case the offense charged was referred to the local District Attorney for investigation and outside prosecution. Consequently, in accordance with paragraph VII D of Commissioner's Bulletin 72-1, no disciplinary hearing was held.

On November 4, 1974, each of the six plaintiffs received a Notice of Classification Hearing. With reference to the plaintiffs Fano, DeBrosky, and Dussault, the reason for review of the classification status was set forth as follows:

> "The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.
>
> "These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage."

With respect to the plaintiffs Hathaway and McPherson, the reason for review of the classification status was stated as follows:

> "The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the

> serious fires occurring with MCI Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

With respect to plaintiff Royce, the reason for review of the classification status was as follows:

> "The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk, (narcotics, barbiturates and/or amphetamines.) This occurred during a period of serious unrest at MCI Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI Norfolk as well as serious property damage."

On November 6, 8, 11 and 13, classification hearings were held with respect to each of the six plaintiffs. Each plaintiff was represented by counsel. The evidence with respect to the alleged offenses committed by the plaintiffs, however, was given in closed session outside of the presence of the plaintiffs and their counsel and was apparently, in each case, in the form of recitation by the defendant Meachum of information purportedly furnished to him by a confidential informant. The nature of this information has never been made known to the plaintiffs or to their counsel even in summary form. They have not been informed of even so much as the dates and places of the alleged offenses.

The classification board made a recommendation for a transfer to either Walpole or Bridgewater in the case of each plaintiff except Royce, who was to be held in administrative segregation for thirty days and given a second classification hearing at the end of thirty days. Each plaintiff appealed this classification recommendation to the defendant Hall. The defendant Hall denied the appeals, but modified the recommendations of the classification com-

mittee and entered orders transferring all of the plaintiffs, including Royce, to MCI, Walpole, except Hathaway, who was ordered to be transferred to MCI, Bridgewater. At the time of the hearing all of these transfers had been accomplished except that of the plaintiff LeBrosky, who was in the hospital at MCI, Norfolk, and Hathaway, who was retained in the RB at MCI, Norfolk.

[1] I find that the conditions of confinement at MCI, Walpole and MCI, Bridgewater, are substantially more adverse than they are at MCI, Norfolk. I further take judicial notice that these institutions have been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction.

RULINGS

This state of facts raises once again the issue of the subjection of prison inmates to what are essentially disciplinary procedures without the elements of due process required under the rule of Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2968, 41 L.Ed.2d 935 (1974). As in Daigle v. Hall, *supra,* a hearing before a disciplinary board was bypassed because the alleged offenses had been referred to the local District Attorney for investigation and prosecution. The applicable rules of law were extensively discussed by this court in the Revised Opinion and Order in Daigle v. Hall filed January 7, 1975, and need not be repeated here.

The defendants assert, however, that the cases of these plaintiffs do not fall within the general rule and that they have received all of the due process to which they are entitled, because the information concerning their alleged offenses was derived from confidential informants. The defendants claim that they are not obliged even to provide a summary of the information derived from the confidential informant, or even so much as the dates and places of the alleged offenses, because to do so would compromise

the confidential informants. They further assert that the policy which they have followed in these cases is necessary to safeguard the lives of the confidential informants, to preserve the flow of information to the administration and to maintain the safety and good order of the institution.

The defendants apparently feel that they are unable, at the medium security institution at Norfolk, to follow the minimum requirements established for such situations at the maximum security prison at MCI, Walpole.

[2] Institution Order 4310.1,* which is applicable to disciplinary hearings at Walpole, contains in Section 11.4 h) the following provisions:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve.
>
> (1) Subjecting the informant to a risk of harm or
>
> (2) A substantial risk to institutional security
>
> (3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record
>
> (4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

[3] It is absolutely basic to any concept of due process that a person charged be given sufficient information con-

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*This Order was not introduced in evidence in this case, but in Daigle v. Hall, *supra.* The defendant Hall, at least, is charged with knowledge of it, and the Court takes judicial notice of it for purposes of this case.

cerning the charge against him so that he may intelligently prepare a defense. The above quoted Section 11.4 h) sets forth the constitutional minimum. The defendants thus have three constitutionally acceptable choices:

1. To follow a procedure substantially in accordance with the above quoted Section 11.4 h);
2. To develop independent evidence which would obviate the need for the confidential informant's testimony; or
3. To forego disciplinary action if the interest in preserving the secrecy of confidential information is deemed paramount.

[4] It is clear that the procedure followed by the defendants with respect to these plaintiffs does not meet constitutional requirements of due process, and their actions with respect to these plaintiffs cannot be allowed to stand. The notice of the hearing, furthermore, must at the very least state the time and place of the alleged offense with reasonable accuracy.

[5] Since uniformity is an aspect of due process in a correctional institution, the matters herein referred to should be the subject of departmental regulation. Most of these matters are covered by the order in Daigle v. Hall, *supra*. There is no evidence of any order in force at MCI Norfolk comparable to Institution Order 4310.1. Some regulation conforming in substance to Section 11.4 h) of that order must be promulgated. Whether it should be promulgated as a departmental order or left to the superintendents of the various institutions to produce approximate versions of it, is up to the defendants. Although Institution Order 4310.1 provides disciplinary hearing rules which exceed the minimum requirements of Wolff v. McDonnell, *supra*, there should be reasonable uniformity within the department; inmates at Norfolk are entitled to at least the level of due process afforded their brethren at Walpole.

[6] In accordance with the foregoing, I hereby enter the following Preliminary Order.

PRELIMINARY ORDER

It is ordered, adjudged and decreed as follows:

1. The defendants are ordered to return the plaintiffs to the general population at MCI Norfolk forthwith, and not transfer them to conditions of confinements substantially more adverse than the conditions of confinement at MCI Norfolk by reason of their specific prior conduct, until they have been afforded a hearing substantially in accordance with the requirements of a disciplinary hearing as set forth in Commissioner's Bulletin 72-1 and Institution Order 4310.1; notwithstanding the fact that much specific prior conduct may have been referred to an outside law enforcement agency for investigation or prosecution.
2. The defendants Hall and Meachum, or either of them, are ordered to submit to the court for approval regulations governing the inmates at MCI Norfolk which will provide them with rights to hearings substantially in accordance with Institution Order 4310.1 and the orders of the court entered in Daigle v. Hall, *supra*.
3. Nothing herein contained shall prevent the defendant Meachum from placing the plaintiffs, or any other inmate, in the Receiving Building for a short period on an emergency basis if, in his considered opinion, the safety of inmates or the good order of the institution require it; provided that in every case an appropriate hearing be afforded the inmate as promptly as possible.
4. This case shall stand for further hearings on the claims of the other eleven plaintiffs and for hearings on the claims of all plaintiffs for damages.

EXHIBIT 7

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Arthur Fano
Date: November 4, 1974

NOTICE OF CLASSIFICATION HEARING

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.

These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Misc. Civil Action No. 74-5095-S
FANO, ET AL.,
Plaintiffs,
v.
MEACHUM, ET AL.,
Defendants.

AFFIDAVIT OF LARRY MEACHUM

I, Larry Meachum, being duly sworn, hereby depose and say:

1. I am the Sunperintendent of the Massachusetts Correctional Institution, Norfolk.

2. During the month of October, 1974 there was a period of serious disruption at M.C.I., Norfolk during which numerous fires were set in the institution. Some of these fires caused severe damage to the institution. Bed space of 100 inmates was rendered unusable by the fires.

3. Based upon information from reliable inmate informant sources which was relayed to me by members of my staff, I concluded that Plaintiffs were among the inmates responsible for the disruption in the institution. Specifically, informant information linked Plaintiffs Hathaway and McPherson to the setting of fires in the institution, Plaintiff Royce to trafficking in contraband (narcotics, barbiturates, and amphetamines), and Plaintiffs Dussault, Fano, and DeBrosky to the possession of weapons.

4. Based upon this information, Plaintiffs and other inmates were removed from the population at M.C.I., Norfolk to an area of separate confinement at the institution. Plaintiffs were then given notices of classification

hearings, copies of which were filed with the Court with a Stipulation of the parties on December 20, 1974.

5. Plaintiffs were then afforded classification hearings at which they could be represented by counsel. I am informed that at the beginning of each hearing, the Plaintiff who was the subject of the hearing was informed that there was informant information to be presented to the board and that this would be done without the inmate or his counsel being present and that the inmate and his counsel were then asked to leave the room. I then presented to the board the informant information which I had received along with a record of prior instances of each informant's information having proved reliable.

6. In my opinion, giving Plaintiffs a more detailed description of the activities they were alleged to have been involved in would have created a substantial risk of revealing the identity of the informants, thereby placing their lives in danger.

7. Following these hearings and final decision by the Commissioner of Correction, the Plaintiffs were removed from M.C.I., Norfolk to M.C.I., Walpole with the exception of Plaintiff Hathaway who was removed to M.C.I., Bridgewater.

8. Except for a few minor instances, the fires at M.C.I., Norfolk stopped after the Plaintiffs and other inmates were removed from the institution.

9. Since the Plaintiffs and other inmates were removed from M.C.I., Norfolk, I and members of my staff have received information from inmates other than the original informants of the effect that the administration had removed from the population of M.C.I., Norfolk the inmates who were responsible for the disruption in October of 1974.

10. In my opinion, if Plaintiffs are permitted to return

to the population at M.C.I., Norfolk, there will be a very great risk of further disruption at the Institution.

(s) LARRY MEACHUM
LARRY MEACHUM

Subscribed and sworn to before me in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, this 22nd day of January, 1975.

(s) ILLEGIBLE
Notary Public

My Commission expires: Nov. 7, 1980.

United States Court of Appeals
For the First Circuit

No. 75-1033

ARTHUR FANO, et al.,
PLAINTIFFS, APPELLEES,
v.
LARRY MEACHUM, et al.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[387 F. Supp. 664]
(WALTER JAY SKINNER, *District Judge*)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Michael C. Donahue, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *John J. Irwin*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

Richard Shapiro, with whom *Robert A. Stolzberg* was on brief, for appellees.

June 27, 1975

COFFIN, *Chief Judge*. We turn once again to the task of evaluating inmates' due process claims in the wake of *Wolff* v. *McDonnell*, 418 U.S. 53 (1974). The district court provides us with a succinct summary of the facts, which the parties accept as accurate. 387 F. Supp. 664, 666-67 (D. Mass. 1975). In the fall of 1974 there was a period of unrest at the Massachusetts Correctional Institution at Norfolk. There were nine fires, thought to have been set, which were serious enough to require the presence of outside fire de-

partments, and several other fires which were less serious. Plaintiffs were taken from the general population at Norfolk and placed in the Receiving Building at the Institution, which serves as an informal segregation unit. On October 25, 1974, each plaintiff was given a copy of a disciplinary report. The offenses charged against each plaintiff were described in substantially the same terms as appeared in the notices of reclassification hearings subsequently received. Since the alleged offenses were referred to the local district attorney for investigation and possible prosecution, the applicable regulation directed that no disciplinary hearings be held.[1]

On November 4 each plainaiff received a Notice of Classification Hearing. These notices reported that information received through reliable sources indicated that the plaintiffs were variously linked to the planning and execution of the fires, possession of contraband such as weapons, or trafficking in drugs. Classification hearings[2] were held, at which each plaintiff was represented by counsel. The evidence with respect to the alleged offenses, however, was given in closed session outside of the presence of plaintiffs

[1] The regulation is based on the theory that to grant a hearing might create difficulties of either double jeopardy or denial of the privilege against self-incrimination. We do not share the view that prosecution may not constitutionaliy be based on conduct which is also the subject of disciplinary proceedings. *See, e.g., Palmigiano* v. *Baxter*, 510 F.2d 537 (1st Cir. 1974). Nor do we feel that this concern on the part of the Commonwealth, if well-founded, could immunize what would otherwise be a due process violation. *See Daigle* v. *Hall*, 387 F. Supp. 652, 660-62 (D. Mass. 1975); note 2 *infra*.

[2] We attach no significance for present purposes to the fact that these proceedings were for "classification" rather than "discipline". Defendants assert that "there are in the instant case as many administrative overtones as disciplinary ones", but we have already indicated that in our view the motive of prison officials, as such, is not properly a part of the due process calculus. *Gomes* v. *Travisono*, 510 F.2d 537, 541 (1st Cir. 1974). Whether the transfer is thought of as punishment or as a way of preserving institutional order, the effects on the inmate are the same and the appropriateness of the action depends upon the accuracy of the official allegation of misconduct.

and their counsel and was apparently, in each case, in the form of a recitation by Superintendent Meachum of information purportedly furnished to him by a confidential informant. The nature of this information was not revealed to plaintiffs or their counsel, even in summary form, nor were they informed of the dates and places of the alleged offenses.

The classification board recommended transfer to either Walpole or Bridgewater for all of the plaintiffs except Royce. These recommendations were appealed to Commissioner Hall. The appeals were denied, though the recommendations were modified in some instances with regard to the receiving institution and Royce was ordered transferred to Walpole.

Plaintiffs sought declaratory and injunctive relief and damages. 42 U.S.C. § 1983. The district court found that the proposed transfers violated the inmates' due process rights under the Fourteenth Amendment, and defendants were enjoined from carrying out the transfers until fuller hearings were held.[3] We have occasion here to review only the propriety of this preliminary injunction, the district

[3] This action was originally commenced by seventeen inmates alleging that their reclassification into substantially more adverse conditions of confinement within Norfolk denied them due process. The six inmates now before the court as appellees subsequently filed an amended complaint raising the additional issue relating to the impending transfers from Norfolk to other institutions. The district court's hearing on the request for a preliminary injunction was limited to the claims of those six plaintiffs. Although the order entered by the district court directed defendants to return the plaintiffs to the general population at Norfolk, the parties to this appeal have addressed themselves only to the issues raised by transfers from Norfolk to other prisons. We therefore will not consider here the application of due process principles to reclassification within a single institution. We note that the reclassification issue has been directly confronted in *Daigle* v. *Hall*, 387 F. Supp. 652 (D. Mass. 1975).

court having reserved decision on the damage claims pending further hearings.[4]

The first issue presented is whether the decision to transfer inmates from Norfolk to maximum security institutions within Massachusetts is of such a character that the due process rights of potential transferees are brought into play. *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1284, (1st Cir. 1973), *vacated*, 418 U.S. 908 (1974), *after remand*, 510 F.2d 534 (1974), *cert. granted*, U.S. (June 9, 1975); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). We first grappled with the due process issues presented by prison transfers in *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir. 1973) That case involved Rhode Island inmates who were being transferred to prisons throughout the country, and, in concluding that such transfers had an impact on inmates' liberty sufficient to require due process protections, we took pains to emphasize that we did not view that disposition as foreclosing a contrary result with regard to intrastate transfers. *Id.* at 1214 n. 8; *id.* at 1217 (Campbell, J., concurring). The Supreme Court subsequently offered its initial guidance in this area. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). *Wolff* established that the forfeiture or withholding of "good time" credits affects a prisoner interest which "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. *Gomes* was vacated for reconsideration in light of *Wolff*, 418 U.S. 539, and after remand we proceeded to reconsider "What procedures are required?", after noting

[4] Defendants' appeal from the district court's failure to dismiss the damage action must be dismissed for want of a final decision. 28 U.S.C. § 1291; *King* v. *Higgins*, 495 F.2d 815, 815 n.1 (1st Cir. 1974).

that *Wolff* reaffirmed "that prisoners suffering the prospect of serious deprivations are entitled to some process". 510 F.2d 537, 539 (1974).

The question thus becomes one of whether the detriment worked by an intrastate transfer from a medium-security institution to a maximum-security prison is serious enough to trigger the application of due process protections. Defendants correctly point out that *Gomes* may be distinguished from the instant case to the extent that our resolution of the interstate transfer question relied upon the assumption that interstate transfers will often be conducted between institutions which are separated by a significant distance. We noted in *Gomes* that the distance factor alone may make communication and visitation more difficult, and it is true that here the geographical issue is an irrelevant one.[5] Moreover, there has been no suggestion that the plaintiffs are subject to the administrative segregation to which interstate transferees were routinely subjected upon arrival at the receiving institutions.

In other ways, however, the disadvantages attendant upon these transfers are both more serious and more certain than those flowing from interstate transfers. While *Gomes* recognized that transferees were subjected to temporary administrative segregation at the receiving prisons, it was not assumed that thereafter their conditions of confinement would be more adverse than they had been before transfer. Defendants have stipulated, however, that Walpole and Bridgewater have stricter security and fewer rehabilitative

[5] Defendants inform us that Norfolk and Walpole are approximately one mile apart. Plaintiffs do not claim that transfer from Norfolk to either Walpole or Bridgewater creates difficulties because of the distance involved. This does not mean, of course, that transfers within a single state will never cover a distance sufficient to make them burdensome. *See United States ex rel. Haymes* v. *Montanye*, 505 F.2d 977 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3282 (Nov. 1, 1974) (No. 74-520).

programs than Norfolk, and that furloughs are more difficult to obtain at Walpole. The district court's findings of fact included the following:

> "I find that the conditions of confinement at MCI, Walpole and MCI, Bridgewater, are substantially more adverse than they are at MCI, Norfolk. I further take judicial notice that these institutions have been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction." 387 F. Supp. at 667.

See also Daigle v. *Hall*, 387 F. Supp. 652, 659 (D. Mass. 1975). Defendants do not challenge the accuracy of this finding, nor could they easily do so in light of the facts to which they had stipulated, though they do argue that the hardships incurred through transfer do not assume constitutional proportions.

It should not escape notice that, aside from the distinctions discussed above, the consequences of intrastate and interstate transfers are for the most part indistinguishable. In either case "disadvantages stem from the breaking off of established programs, both educational and rehabilitative, and orientation to a new setting, programs, rules and companions." *Gomes I*, 409 F.2d at 1213. What was viewed in *Gomes* as a possibility—that a transferee may be considered an identified troublemaker and treated unfavorably as a result—has been stipulated to in this case. The parties agreed that the "determination to transfer Plaintiffs, and the basis therefore, will be noted on their institutional record and will be considered by the Parole Board, the Furlough Board and other administrative agencies of the Department of Correction. This may affect Plaintiffs' attempts to gain parole, furlough, work release, and other privileges." *See generally Catalano* v. *United States*, 383 F. Supp. 346 (D. Conn. 1974).

In light of the disadvantages accompanying the transfers here at issue, the legal principles articulated in *Wolff*, *Gomes* and the transfer cases decided by other lower federal courts compel the conclusion that the due process clause is applicable. At issue is not a simple loss of privileges, for which a hearing may not be required, *Wolff*, 418 U.S. at 571-72 n. 19, but a significant modification of the overall conditions of confinement. We hold that the inmate interests affected fall within the "liberty" protected by the Fourteenth Amendment.[6] *Wolff*, 418 U.S. at 557; *Newkirk* v. *Butler*, 499 F.2d 1214 (2d Cir.), *cert. granted*, 95 S. Ct. 172 (1974); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D. D.C. 1974); *see Palmigiano* v. *Baxter*, 487 F.2d 1280, 1284-85 (1st Cir. 1973), *vacated*, 418 U.S. 908 (1974), *after remand*, 510 F.2d 534 (1974), *cert. granted*, U.S. (June 9, 1975); *Clutchette* v. *Procunier*, 497 F.2d 809, 814-15 (9th Cir. 1974), *on rehearing*, 510 F.2d 613 (1975), *cert. granted*, U.S. (June 9, 1975).

Wolff requires that, having found due process guarantees to be applicable, we proceed to determine what procedures are appropriate under the circumstances. This is done by balancing the substantiality of the loss an inmate would suffer because of transfer against the burden which the procedures would place on prison officials. *Gomes II*, 510 F.2d at 541. While this inquiry will in many cases be multi faceted, here the controversy is an extremely narrow one. In the first place, plaintiffs' only objection to the hearings which they were given is that they were excluded during the recitation of information said to have been provided by

[6] It makes no difference that the Commonwealth need not have created a corrections system containing institutions with divergent conditions of confinement. The advantages of confinement in a more desirable institution are in this regard similar to the state-created right to good time credits which was involved in *Wolff*, 418 U.S. at 556-58.

confidential informants. Plaintiffs were not given any summary of the evidence beyond that contained in the notices which preceded the hearings.

Wolff found that under the circumstances there presented due process required that there be a written statement as to the evidence relied on and the reasons for the disciplinary action. It was recognized, however, "that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence." 418 U.S. at 565. This cryptic reference offers us little assistance in our effort to determine whether the prison officials were within their authority here in declining to reveal the substance of the informant statements. The defendants' freedom of action can be no greater in this context than that which *Wolff* accords with regard to confrontation and cross-examination, matters left "to the sound discretion of the officials of state prisons" because they were viewed as presenting greater hazards to institutional interests than the requirement of a written statement.

That the issue is narrowed even further is evident from the basis of the district court's decision. In ruling that the defendants must provide a summary of the information derived from informants, the district court relied primarily on section 11.4(h) of Institution Order 4310.1 (Jan. 29, 1974), which prescribes the procedures to be followed in disciplinary hearings at Walpole:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve:

(1) Subjecting the informant to a significant risk of harm, or
(2) A substantial risk to institutional security
(3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record
(4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

Defendants misapprehend the basis for the district court's decision when they assert that they "were under absolutely no obligation to follow at Norfolk" this Walpole regulation. Even aside from the equal protection problems which might arise were inmates in different institutions given substantially different procedural protections, the district court properly viewed the Walpole regulation as a persuasive indication that the release of a summary of informant-provided information is not inconsistent with institutional requirements. Indeed, no suggestion has been made that the Walpole rule is unworkable or unduly burdensome. Having chosen to extend the protections of section 11.4(h) to inmates at the maximum-security institution at Walpole, defendants may not, even in the exercise of the discretion recognized in *Wolff*, deny similar procedures to inmates at Norfolk, a medium-security prison. The balancing of interests required for the application of due process principles in the prison environment is not one for which courts are particularly well-equipped, and here the district court quite properly resolved the controversy before it by reference to the balancing reflected in the Walpole regulations.

One subsidiary point remains. Under the procedures mandated by the district court, the notice of hearing given

inmates must "at the very least state the time and place of the alleged offense with reasonable accuracy". Not only is it difficult to discern how a notice lacking this element could adequately inform an inmate of the charges against him and enable him to prepare an adequate defense, *Wolff*, 418 U.S. at 564, but this information would not in any case go beyond that which we have held must be provided in summary form after presentation at the hearing. Since we can see no significant institutional interest which would be served by withholding at the time of notice information which must ultimately be revealed, we agree with the district court as to the required form of notice.

Affirmed.

CAMPBELL, *Circuit Judge* (dissenting). As the issue of intra-jurisdictional prison transfers is under submission before the Supreme Court in *Newkirk* v. *Butler*, 499 F.2d 1214 (2d Cir. 1974), *cert. granted sub. nom. Preiser* v. *Newkirk*, No. 74-107 (argued Jan. 20, 1975), it seems likely that what we do or say here will have only passing significance. Still I shall venture the view that a prisoner's interest in remaining in one institution rather than another within the same state is not a species of "property" or "liberty" as those words are used in the due process clause of the Constitution.

In *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974), the Court held that good-time credits, having been created by the state and denied as a penalty for major misconduct, were embraced within fourteenth amendment "liberty". *See Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). *See also Haines* v. *Kerner*, 404 U.S. 519 (1972) (disciplinary confinement

affects a protected interest). But transfers [1] seem to me to belong in a quite different category. Transfers unquestionably have a major impact on the personal life of a prisoner (although intrastate transfers do not uproot the inmate and separate him from a unitary system of correction and parole as in the case of interstate transfers). But in deciding whether or not to label the prisoner's interest therein a "liberty" or (less plausibly) a "property" interest within the fourteenth amendment, it should be recognized that Massachusetts has not conferred a statutory right upon inmates to be at one institution rather than another. While Walpole is a more secure facility than Norfolk, a prisoner has no vested right to serve his term in one place rather than the other. One might draw an analogy, admittedly only suggestive, to the status of school teachers: good-time rights, like a tenured teacher's expectation of continued employment, are matters of entitlement absent cause for severance; but a prisoner's preference that he be lodged at Norfolk rather than Walpole is not a matter of entitlement and seems more analogous to a probationary teacher's unsecured hope to retain a job. *Cf. Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The tenured teacher's interest is, of course, a "property" rather than a "liberty" interest. Still, even in defining a prisoner's "liberty" interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in the position has any claim to what was taken away.[2] Prisoners are, by definition, prisoners.

[1] This circuit held in *Gomes* v. *Travisono*, 490 F.2d 1209 (1973), *vacated and remanded*, 418 U.S. 908 (1974), *aff'd in part*, 510 F.2d 537 (1974), that transfers of state prisoners to out-of-state correctional institutions pursuant to interstate compact triggered due process standards. I expressly reserved judgment on transfers within a single jurisdiction.

[2] A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer "grievous loss", but the nature of the organization and of their role precludes acknowledging any "liberty" or "property" right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on "privileges" as opposed to "rights", it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to any protection against that loss.

Changes in the conditions of confinement, whether involving a different cell assignment, a new meal schedule, or transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard, and rehabilitate. To treat them as "liberties" belonging to the inmate invites greater interference with the management of prisons than seems either wise or constitutionally mandated.

Where within the state penal system a prisoner is to be lodged seems to me a judgment which the state has the exclusive right to make — summarily if need be. Such decisions are part and parcel of its power to keep the prisoner safely, to protect other prisoners, and to operate its prisons. State penal systems normally consist of more than one institution. Indeed, large states may have dozens of such institutions. Administrators must decide where best to place inmates. They must consider available space and facilities and which programs are best suited to which inmates. As prisoners are involuntary inhabitants and some are dangerous and unpredictable, administrators must decide whether a given inmate is more likely to escape from one place than another, and whether the mere presence of an inmate in a given setting is likely to be volatile and more dangerous. Such judgments may often be little more than educated guesses based on suspicions. They may involve predictions of future dangerousness which in turn echo assumptions as to the inmate's role in past disturbances. While I can understand the argument that no adverse assumptions should ever be made without minimal due process—hearing, confrontation of witnesses, and the like

—I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards but I do not think the Constitution can reasonably be said to require them.

I concede that transfers of the present sort—based on charges of past misconduct rather than on more general grounds—bear many resemblances to disciplinary actions. Here the inmate's record will reflect the grounds for transfer and this will affect his parole rights. In *Gomes I*, dealing with interstate transfers, we thought that a distinction could be made between punitive and non-punitive transfers. But on reflection we recognized, correctly I believe, that giving effect to labels of that sort raised more problems than it solved. It would invite litigation and confusion over the "real" as opposed to the ostensible reason for transfer. Moreover, transfers based on past misconduct are not so much punitive as they are intended to ward off future disruption at the transferor institution. The decision is thus also truly "administrative". In *Gomes II* we eliminated any attempted distinction, and decided that all out-of-state transfers should be treated alike for due process purposes. I think this is the right approach, and I would not wish to decide the present case on the basis of fine-spun distinctions between labels. Rather I feel obliged to conclude that an inmate is no more entitled to due process protection in connection with transfers for purported misconduct than he would be for any other reason. The reason for transfer is simply irrelevant. The state's interest is paramount.[3]

[3] Administrative realities may sometimes necessitate the flexibility to transfer even on the basis of demonstrably inadequate information. If, for example, the warden has narrowed the likely cause of disruption down to several inmates, he may deem it prudent to transfer all without having objective proof that all are involved. A 40% risk that an inmate will disrupt or set a fire may, in some circumstances, be too great to take. The safety of other inmates and prison personnel may have to be weighed against fairness to certain individuals.

Nonetheless, while the greater good of the institution and its other inmates may require that administrators retain broad transfer power, there can be no reason to permit an inmate's parole chances to be diminished by derogatory information he is never allowed to meet. This is a separate and different question. If Parole is a "liberty" right entitling an inmate to fair procedures, I would forbid the use of the fact of transfer by the parole board unless the charges upon which the transfer was based were established in a manner comporting with due process.

I would reverse the decision of the district court, except I might enjoin the adverse use of the fact of transfer in any future parole proceedings.

Supreme Court, U. S.
FILED
JAN 23 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, ET AL.,
PETITIONERS,

v.

ARTHUR FANO, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED 8/16/75
CERTIORARI GRANTED 12/8/75

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 5059-S

ARTHUR FANO, RICHARD DEBROSKY, ERNEST DIETRICH, ROBERT O'NEAL, ROBERT DUSSAULT, DAVID HATHAWAY, ROBERT HERES, LAWRENCE MULCAHEY, EDWARD SWAYLES, ARTHUR KEAGNEY, JOHN CAMPBELL, DANIEL FERRIERA, STEPHEN GORDON, DANIEL WOODS, RICHARD MCPHERSON, CHARLES ROYCE and JASPER DURANT,

PLAINTIFFS,

v.

LARRY MEACHUM, Superintendent, M. C. I., Norfolk, Individually and in his official capacity,

DEFENDANT.

DOCKET ENTRIES

1974

Nov. 4 Complaint and motion for Temporary Restraining Order received for filing. Motions to proceed in forma pauperis, filed.

4 SKINNER, J. Motion for TRO, DENIED. Motions to proceed in forma pauperis ALLOWED.

5 Summons issued.

Dec. 12 Amended complaint and request for Temporary Restraining Order, filed.

13 SKINNER, J. Counsel appears before Court for hearing on pltfs' request for TRO and preliminary injunction; continued to Dec. 20, 1974 at 2:00 PM.

13 Summons issued on amended complaint.

19 Motion for writ of habeas corpus ad testificandum, filed.

19 SKINNER, J. Motion for writ of habeas corpus, ALLOWED. Writ issued.

1974

20 SKINNER, J. Hearing on pltfs' request for TRO and preliminary injunction; stipulation of facts, filed; defts' motion for in camera inspection of evidence and for the issuance of a protective order relating to such evidence, filed; testimony; evidence; taken under advisement.

1975

Jan. 7 Answer of deft. Meachum, filed.

10 SKINNER, J. Opinion and Order, entered. Copies to counsel and Mass. Lawyers Weekly.

16 Deft's Notice of Appeal filed. c/s
Deft's motion for stay pending appeal filed.

17 SKINNER, J. Hearing on defts' motion for stay of order pending appeal; arguments by counsel; court orders paragraph 1 stayed until Jan. 21, paragraph 2 is stayed pending appeal.

17 SKINNER, J. Statement of reasons for denying stay, entered.

17 SKINNER, J. On motion for stay—allowed as to paragraph 2 of the Order dated 1/10/75 Paragraph 1 of said Order is stayed until January 21, 1975. Otherwise denied.

21 Order of Court received from the Court of Appeals entered . . . It is ordered that the order of the District Court of 1/10/75 be and the same hereby is stayed until further order of this Court. (original pleadings in the Ct. of Appeals)

23 Memorandum and Order on appellants' motion for stay pending appeal entered . . . granted until further order of court.

24 Certified copy of docket entries and original pleadings delivered to the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 75-1033
Transferred from M 75-8006

ARTHUR FANO ET AL.,
v.
LARRY MEACHUM, Superintendent etc.

GENERAL DOCKET

1975

Jan. 27 Record on appeal in one volume filed and case docketed.

31 Appearances of Francis X. Bellotti and Michael C. Donahue for appellant filed.

Feb. 13 Appendix to briefs and brief for appellants filed.

14 Supplemental certificate to record on appeal consisting of certain exhibits and other documents received and filed.

24 Assigned for hearing at the March, 1975 session.

28 Brief for appellees, filed.

Mar. 4 Motion filed. Order (Coffin, Ch.J.) allowing motion of the parties to supplement record and appendix. Notices mailed.
Summary of Plaintiff, Hathaway's testimony filed.
Appearance of Richard Shapiro filed for appellees.
Heard by Coffin, McEntee & Campbell, JJ.

7 Motion filed. Order (Campbell, J.) granting leave to appellees to file post argument supplemental brief. Notices mailed.

7 Post argument supplemental brief filed.

13 Motion filed. Order (Coffin, Ch.J.) is granting leave to appellants to file a memorandum in reply

1975

to appellees' post argument supplemental brief. Notices mailed.

June 27 Judgment: The order of the District Court is affirmed. Opinion by Coffin, Ch.J.
Dissenting opinion by Campbell, J. Notices mailed.

July 3 Motion filed. Order (Coffin, Ch.J.) staying mandate to August 15, 1975. Notices mailed.

16 Motion to vacate stay of mandate filed.

17 Opposition to vacate stay of mandate filed.

23 Order (Coffin, Ch.J., McEntee & Campbell, JJ.) denying motion to vacate stay of mandate. Notices mailed.

Aug. 21 Copy of certificate evidencing docketing in the Supreme Court (No. 75-252) [8/16/75] filed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title omitted in printing]

VERIFIED COMPLAINT

NATURE OF ACTION AND JURISDICTION

1. Plaintiffs bring this action pursuant to Title 42 U.S.C. §1983 for declaratory, injunctive and compensatory relief against defendant who, acting under color of state law, is punishing plaintiffs in violation to their constitutional civil rights of due process of law.

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. §§ 1343, 2201 and 2202 and Title 42 U.S.C. §1983.

PARTIES

3. Plaintiffs are all residents of M.C.I., Norfolk (hereinafter Norfolk), serving sentences imposed by the Courts of Massachusetts. All are now confined in the Receiving Building (hereinafter R.B.).

3. Defendant LARRY MEACHUM is the Superintendent of Norfolk. As such, he has full authority over all disciplinary and security measures taken at the institution. He is sued individually and in his official capacity.

STATEMENT OF CLAIMS

4. Plaintiffs ARTHUR FANO, ROBERT O'NEAL, RICHARD DEBROSKY, and ROBERT DUSSAULT were taken from general population on October 24, 1974. They were placed in lock-up status in R.B. On October 25, each was given a disciplinary report. The reports were identical and said that on the basis of a "reliable source" it was determined that he "possessed certain instruments that might be used as weapons, and further that he had joined in plans to use these items of contraband." (See attached exhibits Nos. 1, 2, and 3.)

5. Plaintiffs DAVID HATHAWAY, EDWARD SWAYLES, LAWRENCE MULCAHEY, ARTHUR KEAGNEY, ERNEST DIETRICH, DANIEL FERRIERA, JOHN CAMPBELL, STEPHEN GORDON, DANIEL WOODS and ROBERT HERES were taken from general population on October 24, and placed in lock-up status in R.B. On October 25, each received disciplinary report stating that "through reliable sources" it had been determined that he "has been significantly involved in the planning and execution of one or more" of the fires which had struck Norfolk. (See attached Exhibits Nos. 4 and 5.)

6. Plaintiff RICHARD MCPHERSON was taken from general population on or about October 16, 1974, and taken to R.B. He received no notice of why he was being segregated until October 25, when he received a disciplinary report similar to the ones described in paragraph 5.

7. Plaintiff CHARLES ROYCE was taken from general population to R.B. on October 24. On October 25, he was given a disciplinary report which alleged that "it has been determined through a very reliable source that Charles Royce was involved in the trafficing [sic] of Contraband

in the institution." The charge was titled "Passing or receiving Contraband from other inmates or visitors" and "Possession of Narcotics, barbiturates and/or amphetamines." (See attached Exhibit No. 6).

8. On October 25, 1974, plaintiff JASPER DURANT was charged with "disobeying an order" and "causing a disturbance." He was convicted and sentenced to two days in segregation. When he completed his two days, he was taken to R.B. where the other plaintiffs in this suit were being held. He has never received any notification of why he is not being permitted to return to general population.

9. In addition to the above charges, ARTHUR FANO was charged with using "threatening language toward other inmates."

10. In addition to the above charges, plaintiff JOHN CAMPBELL was charged with flooding his cell, and pleaded guilty, but no punishment was being imposed.

11. On information and belief, Defendant LARRY MEACHUM personally signed all the disciplinary reports referred to in paragraphs 5 through 9.

12. On October 25, plaintiffs' attorneys spoke with defendant MEACHUM. At that time he assured plaintiffs' attorneys that by the end of that day the men in R.B. would be given disciplinary reports or be released from R.B.

13. On October 30, plaintiffs' attorneys spoke with defendant MEACHUM's agents, Susan Richmond and Deputy Superintendent Murphy. Plaintiffs' attorneys were then told that none of the men held in R.B. would be given any hearing until the District Attorney had acted, no matter how long that would be.

14. Plaintiffs claim that they are innocent of any wrongdoing. They are being punished without due process of law:

a. They have not been informed of the charges against them, in that the allegations of the disciplinary reports are so vague as to be meaningless. For example, plaintiff FANO is permitted to have a leather shop in the institution in which he must use and possess scissors, razors, knives, hammers, etc., yet he is charged with violating institution rules by having "instruments that might be used as weapons."

b. They have not been informed of the evidence against them in that in every case there is only reference to an anonymous informant.

c. They have not been afforded an opportunity to present their side of the story, in that the disciplinary slips leave blank the section setting a date for a hearing and the defendant has informed them, through counsel, that they will not receive a hearing.

15. Defendant MEACHUM's action in keeping plaintiffs in R.B. is punishment in that it works a grievous loss upon them.

a. They are locked in their cells 23 hours a day, although in general population inmates are never locked in their cells;

b. They are not permitted to have their personal property, including radios or televisions, that they could have in general population.

c. The only facility for washing clothes is the cold-water sink in their cell, unlike the laundry service they could use from general population.

d. They are allowed to exercise only for one hour every other day and even this time is restricted to a roof-top cage.

e. They are totally segregated from the rest of the prison population.

f. They are not permitted to take part in prison programs for their rehabilitation, including school and work. They are denied the wages they could earn were they allowed to work.

g. They are not allowed to go to the canteen.

h. They are not permitted to make phone calls, even to their lawyers, thus reducing still further their contact with the rest of the world and interfering with their right to counsel. This latter is particularly important in light of the fact that the defendant has accused them of criminal acts and referred their cases to the district attorney.

i. They are being deprived of an opportunity to prepare their defense to the criminal charges preferred by defendant MEACHUM, in that they cannot identify and speak to potential witnesses, and gather documentary evidence.

j. They are not allowed to go to messhall for meals, but must eat in their cells.

k. they are only given one bedsheet and no pillow case.

WHEREFORE, PLAINTIFFS pray this Court:

1. Adjudge and declare that defendant's action in punishing plaintiffs without due process of law violated their rights under the Sixth and Fourteenth Amendment of the United States Constitution;

2. Issue a temporary restraining order ordering defendant to release plaintiffs to general population immediately;

3. Issue a preliminary injunction ordering defendant to release plaintiffs to general population immediately;

4. Issue a permanent injunction ordering defendant to release plaintiffs to general population immediately;

5. Issue a permanent injunction ordering defendant to expunge from the records of plaintiffs all reference to the disciplinary reports referred to in paragraphs 5 through 9;

6. Award each plaintiff judgment for $300.00 in compensatory damages;

7. Award each plaintiff judgment for $10,000. for punitive damages;

8. Grant plaintiffs costs and attorneys fees;

9. Order such other and further relief as this Court deems appropriate.

Dated: November 4, 1974

(s) ROBERT STOLZBERG
ROBERT STOLZBERG
LINDA OLMSTEAD
Attorneys for Plaintiffs
Roxbury Defenders Committee
126 Warren Street
Roxbury, Massachusetts 02119
Tel: (617) 445-5640

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK, SS:

The undersigned, attorneys admitted to practice in the courts of Massachusetts, show: that deponents are attorneys of record for plaintiffs in the within action; that deponents have read the foregoing complaint and know the contents thereof; that the same is true to deponents' own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further states that the reason this verification is made by deponent and not by the plaintiff is due to plaintiffs' incarceration at M.C.I., Norfolk.

The grounds of deponents' belief as to all matters not stated upon deponents' knowledge are as follows: personal interviews with plaintiffs and defendants.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: November 4, 1974
Roxbury, Massachusetts

(s) ROBERT STOLZBERG
ROBERT STOLZBERG
(s) LINDA OLMSTEAD
LINDA OLMSTEAD

EXHIBIT 1

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-25-74 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Arthur Fano
No. N21031 Report No. 74-366

Offense: Using threatening or any other improper language toward any other inmate.
Passing or receiving contraband from other inmates.

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI Norfolk which posed a significant threat to person, property and security, it has been determined through a reliable source that Arthur Fano used threatening language toward other inmates, and that he possessed certain instruments that might be used as weapons, and further that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 2

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Richard Debrosky

Offense: (10) Making or having in your Possession any type of dangerous weapon
No. N-19566 Report No. 74-372

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI—Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Richard Debrosky was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 3

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Robert Dussault
No. N-20427 Report No. 74-368

Offense: (10) Making or having in your possession any type of dangerous weapon

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI—Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Robert Dussault was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 4

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: David Hathaway
No. N-20664 Report No. 74-374

Offense: (7) Willfully disfiguring or damaging any part of the institution

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of serious fires within MCI Norfolk which caused considerable property damage, and posed a very real threat to personal safety, it has been determined through reliable sources that David Hathaway has been significantly involved in the planning and execution of one or more of these fires.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 5

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10/25/74 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Stephen Gordon
No. N21899 Report No. 74-371

Offense: 7 — Wilfully disfiguring or damaging any part of the institution.

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of serious fires within MCI Norfolk which caused considerable property damage, and posed a very real threat to personal safety, it has been determined through reliable sources, that Stephen Gordon has been significantly involved in the planning and execution of one or more of these fires.

My personal comments
Larry Meachum has his Mama working the Block

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 6

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Charles Royce
No. N-21546 Report No. 74-370

Offense: (16) Passing or Receiving Contraband from other inmates or visitors
(26) Possession of Narcotics, barbiturates and/or amphetamines

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI—Norfolk which posed a significant threat to person, property, and security, it has been determined through a very reliable source that Charles Royce was involved in the trafficing of Contraband in the institution.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

AMENDED VERIFIED COMPLAINT

I. INTRODUCTION

This is a Civil Rights class action for declaratory, injunctive, and compensatory relief pursuant to 42 U.S.C. Sec. 1983. Defendants, who are officials of the Department of Correction, acting under color of state law, have deprived Plaintiffs, who are prison inmates presently confined in the correctional institutions of the Commonwealth, of their right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that: 1) Defendants have caused Plaintiffs to be transferred from general population at M.C.I. Norfolk to segregation cells for disciplinary reasons without affording Plaintiffs a constitutionally mandated disciplinary hearing; 2) Defendants have ordered Plaintiffs to be transferred from M.C.I. Norfolk to other prisons, causing Plaintiffs a grievous loss, after hearings which did not comport with due process.

II. JURISDICTION

2. This action arises under 42 U.S.C. § 1983, and 28 U.S.C. §2201, and jurisdiction is conferred on this Court by 28 U.S.C. §1343.

III. PARTIES

3. Plaintiffs ARTHUR FANO, RICHARD DE BROSKY, ROBERT DUSSAULT, DAVID HATHAWAY, RICHARD MCPHERSON and CHARLES ROYCE are all inmates of Massachusetts Correctional Institutions, serving sentences imposed by the Courts of Massachusetts.

4. Defendant LARRY MEACHUM is the Superintendent of M.C.I. Norfolk and, as such, is responsible under state law

for the overall supervision, management, and control of M.C.I. Norfolk, including the immediate responsibility for the discipline and classification of inmates confined therein. He is being sued in his individual and official capacities.

5. Defendant FRANK HALL is the Commissioner of Correction for the Commonwealth of Massachusetts and, as such, is responsible under state law for the policies and procedures for determining and reviewing the classification status of Plaintiffs, and is also ultimately responsible for developing and implementing classification, as well as disciplinary, policies and procedures. He is being sued in his individual and official capacities.

6. Defendant WILLIAM DAWBER is Acting Deputy Commissioner for Classification and Treatment and, as such, is responsible for formulating and supervising the policies and procedures for classification and is authorized to act on all institutional classification recommendations. Defendant DAWBER is being sued in his individual and official capacities.

IV. CLASS ACTION ALLEGATIONS

7. Plaintiffs bring this class action pursuant to Rule 23(a), and 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure.

8. The class consists of inmates of Massachusetts Correctional Institutions who are presently, or may be subject to disciplinary or administrative determinations which result in the imposition of punitive sanctions or the transfer to more restrictive terms and conditions of confinement.

9. The class has at least 2,700 members, and is so numerous that joinder of each member is impractical. The questions of law raised in this action, including but not limited to the constitutionality of the use of informant information as the basis for the imposition of administrative or disciplinary sanctions without providing the procedural requisites of the due process clause, are common

to all members of the class. The claims of the named Plaintiffs are typical of the claims of the class. The named Plaintiffs have a strong, personal interest in the outcome of the litigation, and will fairly and adequately represent the class, since their attorneys are active and experienced in federal prisoners' rights litigation. In any event, most members of the class are indigent and are not able to secure individual representation.

10. Individual members of the class can be easily identified and notified of this action making management of the case relatively simple. Since there is no conflict among the members of the class, there is no need for individual class members to control the action. Since this Court has jurisdiction over the claims of all class members against all Defendants, and has the power to grant relief that fully protects the rights of all parties, a class action is preferable to a multiplicity of individual suits.

V. Claims For Relief

First Count

11. Plaintiff Richard Mc Pherson was taken from M.C.I. Norfolk general population on or about October 16, 1974, and placed in segregation in the Receiving Building at M.C.I. Norfolk (hereinafter the R.B.). He was not told why he was placed in segregation, nor was he provided with any notice or hearing prior to his placement therein.

12. Plaintiffs Arthur Fano, Richard De Brosky, Robert Dussault, David Hathaway and Charles Royce were taken from general population at M.C.I. Norfolk on October 24, 1974, and placed in segregation in the R. B. They were not provided with any prior written notice of the reason for their placement in segregation nor with any hearing prior to their placement therein.

13. On October 25, 1974, the Plaintiffs' attorneys spoke with Defendant Meachum. At that time he assured Plaintiffs' attorneys that by the end of that day the men in

the R.B. would be given disciplinary reports or be released from the R.B.

14. On October 25, 1974, Plaintiffs were given disciplinary reports. Each was signed by Defendant Meachum:

a) Plaintiff Fano's report stated that:
   After a series of problems within MCI Norfolk which posed a significant threat to person, property and security, it has been determined through a reliable source that Arthur Fano used threatening language toward other inmates, and that he possessed certain instruments that might be used as weapons, and further that he had joined in plans to use these items of contraband.

b) Plaintiff De Brosky's report stated that:
   After a series of problems within MCI Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Richard Dubrowsky (sic) De Brosky was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

c) Plaintiff Dussault's report stated that:
   After a series of problems within MCI Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Robert Dussault was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

d) Plaintiff Hathaway's report stated that:
   After a series of serious fires within MCI Norfolk which caused considerable property damage, and posed a very real threat to personal safety, it has

been determined through reliable sources that David Hathaway has been significantly involved in the planning and execution of one or more of these fires.

e) Plaintiff Royce's report stated:

Offense:

(16) Passing or Receiving Contraband from other inmates or visitors.

(26) Possession of Narcotics, barbiturates and/or amphetamines.

• • •

After a series of problems within MCI Norfolk which posed a significant threat to person, property, and security, it has been determined through a very reliable source that Charles Royce was involved in the trafficking of Contraband in the institution.

f) Plaintiff Mc Pherson's report stated that:

After a series of serious fires within MCI Norfolk which caused considerable property damage, and posed a very real threat to personal safety, it has been determined through reliable sources that Richard Mc Pherson has been significantly involved in the planning and execution of one or more of these fires.

(See Exhibits Nos. 1, 2, 3, 4, and 6, copies attached hereto.)

15. Each of the above cases was referred to the District Attorney's office for investigation and prosecution pursuant to M.G.L. ch. 127 §38C.

16. On October 30, 1974, Plaintiffs' attorneys spoke with Defendant Meachum's agents, Susan Richmond and Deputy Superintendent John Murphy and requested, on Plaintiffs' behalf, that a Disciplinary Board hold a hearing to determine Plaintiffs' custody status pending the District Attorney's action on the referred charges as is required by Commissioner's Bulletin 72-1, § VII-D. Plaintiffs' attorneys were then told that none of the men held

in R.B. would be given any hearing until the District Attorney had acted, no matter how long that might be.

17. Plaintiffs' counsel was informed by Lieutenant Joyce of the District Attorney's Office on Monday, November 25, 1974, that there was insufficient evidence to support an indictment on the charges referred to in ¶14, and that the cases would be returned to M.C.I. Norfolk for institutional disciplinary action.

18. No disciplinary hearing pursuant to Commissioner's Bulletin 72-1 was ever held on the charges referred to in ¶14.

19. Being placed in segregation rather than general population at M.C.I. Norfolk inflicts a grievous loss upon Plaintiffs and is, therefore the constitutional equivalent of punishment:

a) Plaintiffs are locked in their cells 23 hours a day, although in general population inmates are never locked in their cells.

b) Plaintiffs are not permitted to have their personal property, including radios or televisions, that they could have in general population.

c) The only facility for washing clothes in the R.B. is the cold-water sink in each Plaintiff's cell, unlike the laundry service they could use in general population.

d) Plaintiffs are allowed to exercise only for one hour every other day and even this time is restricted to a roof-top cage. In general population, there are baseball, football, basketball, handball and other recreational facilities, and depending upon his schedule an inmate can spend eight or more hours per day using these facilities.

e) Plaintiffs are totally segregated from the rest of the prison population.

f) Plaintiffs are not permitted to take part in prison

programs for their rehabilitation, including school and work programs, unlike inmates in general population. They are denied the wages they could earn were they allowed to work.

g) Plaintiffs are not allowed to go to the canteen as are members of general population.

h) Plaintiffs are not allowed to go to the mess hall for meals as they are in general population but must eat in their cells, where the food is frequently cold.

20. On November 4, 1974, Plaintiffs filed the original complaint in this case, asking for a Temporary Restraining Order and other relief. Plaintiffs notified Defendant MEACHUM's counsel, Robert Bell, Esq., Chief Counsel for the Department of Correction, of the action.

21. On the evening of November 4, 1974, Plaintiffs were served with notice that they would receive classification hearings before a Department Review Board pursuant to Department Order 4400.1, to determine Plaintiffs' custody status and possible transfer. These notices repeated the allegations of the disciplinary reports referred to in ¶14, and further stated that Defendant MEACHUM had decided that Plaintiffs' confinement in segregation awaiting action of this board was necessary pursuant to D.O. 4400.1 ¶6.4b. (See attached Exhibits Nos. 7 and 8.) This decision to confine Plaintiffs in segregation for periods up to three weeks was made without any hearing.

22. On November 6, 8, 11, 13, and 14, Plaintiffs' classification hearings were held. At each hearing the procedure was basically the same. Each Plaintiff was allowed to tape record the hearing, provided that the Department of Correction maintained control of the tapes afterwards.

23. The Board opened each hearing by reading a prepared statement. It then ordered the Plaintiff, and his representative to leave the room, while on information and

belief it took secret, unsworn, and hearsay testimony from Defendant MEACHUM. In each case the Board:

a) Refused to call and question the informant, and relied instead upon the hearsay testimony of Defendant MEACHUM.

b) Refused to tape-record Defendant MEACHUM's testimony, even after Plaintiffs agreed that they would not have access to that part of the tape, but merely wanted to preserve a record for a possible review of the proceedings.

c. On information and belief, Defendant MEACHUM's testimony was not taken under oath.

24. After Defendant MEACHUM had completed his testimony and left, each Plaintiff was brought back into the hearing. In at least one case, that of Plaintiff DUSSAULT, the Board admitted that it had determined that the anonymous informant was reliable before hearing anything from Plaintiff.

25. The Board refused to tell Plaintiffs anything at all regarding the testimony of Defendant MEACHUM.

26. The Board then heard evidence from each Plaintiff's social workers, and any witnesses he could produce. The Board refused to compel any guards to come and testify in behalf of Plaintiffs as they had requested.

27. The evidence presented at the hearing about each Plaintiff was highly favorable:

a) DAVID HATHAWAY: He has had no disciplinary reports according to institutional records and had extensive and successful involvement in rehabilitative prison programs. He testified that he had built up a large prison avocation business which was extensively damaged in the very fires which he was accused of planning and executing. His social worker testified that Plaintiff HATHAWAY, in his role as unit representative, had been instrumental in keeping tensions

under control at the institution and in preventing disturbances.

b) ARTHUR FANO: He has had only one, minor disciplinary report according to institutional records. He presented a witness, Mr. William Leonard of the Recreation Department, who testified that he had always worked hard and been very fair in their dealings, which were extensive, and that Plaintiff FANO had never caused any trouble. Plaintiff FANO testified that his avocation is a leather shop, for which he is permitted to have scissors, knives, and other tools.

c) ROBERT DUSSAULT: According to institutional records he had no disciplinary reports at M.C.I. Norfolk. He presented a letter from his institutional supervisor, Mr. Charles Ristaino, which stated that he was an excellent worker and had never created any trouble. Plaintiff DUSSAULT testified that as an institutional plumber, he must use various tools that could be considered potential weapons.

d) RICHARD DE BROSKY: According to institutional records he had no disciplinary record and has successfully completed ten furloughs. He had a very good work record at the institution.

e) RICHARD MC PHERSON: The board's records indicated that he had taken part in a classification hearing only one month earlier, at which hearing the Classification Board made a specific finding that he should be at M.C.I. Norfolk. That Board said that he should get involved in counselling and education programs, and Plaintiff MC PHERSON testified that he had done so. He has had a perfect disciplinary record since his transfer to M.C.I. Norfolk according to institutional records.

f) CHARLES ROYCE: According to institutional records he has had only one disciplinary report while at

M.C.I. Norfolk. He presented a witness, his supervising correctional officer, Thomas Dresner, who testified that he had been an exceptionally excellent worker in the visiting room at M.C.I. Norfolk, doing much to improve conditions for prisoners and their visitors. His social worker, Jack Jackson, testified concerning Plaintiff ROYCE's involvement in counseling and the significant strides he had been making due to his close therapeutic relationship with his counselor, Miss Louchstein.

28. Each Plaintiff denies, and denied to the Board any activity alleged in the disciplinary charges and in the notice of the classification hearing.

29. At the conclusion of each hearing, the Board announced its recommendations:

a) DAVID HATHAWAY was to be transferred to M.C.I. Bridgewater.

b) ARTHUR FANO was to be transferred to M.C.I. Walpole.

c) ROBERT DUSSAULT was to be transferred to M.C.I. Bridgewater.

d) RICHARD DE BROSKY was to be transferred to M.C.I. Bridgewater.

e) RICHARD MC PHERSON was to be transferred to M.C.I. Walpole.

f) CHARLES ROYCE was to be held in administrative segregation for 30 days and be given a second classification hearing at the end of 30 days.

30. Plaintiffs were not given a written statement of the reasons for the board's action, nor of the evidence relied upon.

31. Despite their request, Plaintiffs were not allowed to see the report of the Board to Defendant HALL recommending their transfer, nor were they informed of its contents.

32. Each Plaintiff except ROYCE appealed to the Com-

missioner to review the Board's determination and to order that he be placed in general population at M.C.I. Norfolk. (See Exhibits Nos. 9-12, attached hereto.) On information and belief, this review was personally made by Defendants HALL and DAWBER. They did not make an independent investigation but relied wholly upon the record made in the Classification Board hearing. They based their decision solely upon the information presented therein. Each appeal was denied:

a) In the case of Plaintiffs FANO, DUSSAULT, HATHAWAY and MC PHERSON the Classification Board recommendation was upheld. (See attached Exhibits Nos. 13 and 14.)

b) In the case of Plaintiff DE BBOSKY, the recommendation of the Board to transfer Plaintiff to M.C.I. Bridgewater was overturned and he was ordered transferred to M.C.I. Walpole. (See Attached Exhibit No. 15.)

c) Defendants HALL and DAWBER made a *sua sponte* review of Plaintiff ROYCE's case and decided to transfer him to M.C.I. Norfolk. (See attached Exhibit No. 16.)

33. Plaintiffs have not been given a written statement of the reasons for the Commissioner's decision, nor of the evidence relied on in making that decision.

34. On or about November 1, 1974, Plaintiff DE BROSKY was transferred to the hospital at M.C.I. Norfolk for medical reasons. There he was kept in segregation status substantially similar to that of the R.B. until about November 18, 1974, when he was allowed on the general ward. He is now awaiting transfer to M.C.I. Walpole. Defendants continued to keep all other Plaintiffs in segregation until approximately December 1, 1974, when they transferred Plaintiffs FANO, DUSSAULT, ROYCE, and MC PHERSON to M.C.I.

Walpole. Plaintiff Hathaway remains in segregation and is awaiting transfer.

35. Defendants held Plaintiffs in segregation without any hearing whatsoever for periods up to nearly a month. In the case of Plaintiff MC PHERSON, he was not even given any reason for his confinement for over a week.

36. When Plaintiffs finally received a hearing, it was before the Classification Board which considered only the question of Plaintiffs' transfer to another facility and not Plaintiffs' pre-hearing or post-hearing segregation.

37. The Classification Hearing did not provide Plaintiffs with the minimal due process rights guaranteed them whenever they are subject to punishment or administrative sanctions which would constitute a grievous loss.

38. Except in the case of Plaintiff ROYCE, neither the Classification Board nor any other fact-finding body has ever determined or recommended that Plaintiffs should be placed in segregation. The determination to segregate Plaintiff ROYCE was overturned by the Commissioner.

39. Defendants' actions in placing and keeping Plaintiffs in segregation without providing Plaintiffs with a hearing which considered the question of whether segregated confinement is appropriate, and which then determined that such segregated confinement is appropriate, and which meets the procedural protections of due process including, at a minimum, those protections outlined in Commissioner's Bulletin 72-1 violates Plaintiffs right to due process of law under the Fourteenth Amendment to the Constitution of the United States.

Second Count

40. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 3 through 38.

41. The determination of the Classification Board to send Plaintiffs to M.C.I. Walpole and M.CI. Bridgewater subjects Plaintiffs to a grievous loss, to wit:

a) M.C.I. Norfolk is a medium security institution, whereas M.C.I. Walpole is a maximum security institution. Therefore, at the latter Plaintiffs are subject to much stricter security measures than at M.C.I. Norfolk. Further, M.C.I. Walpole offers far fewer rehabilitative programs such as educational and work-release opportunities than M.C.I. Norfolk, and it is much more difficult to obtain furloughs.

b) M.C.I. Norfolk is a medium security institution, whereas M.C.I. Bridgewater is a maximum security institution. Therefore, at the latter Plaintiffs are subject to much stricter security measures than at M.C.I. Norfolk. Further, M.C.I. Bridgewater is a much older prison than M.C.I. Norfolk. It is very dirty and unsanitary, with grossly insufficient plumbing installations. It has very limited programs, compared with the full complement of rehabilitat[redacted] programs at M.C.I. Norfolk.

c) Residents at M.C.I. Norfolk are encouraged to take part in institutional affairs. It works a great harm to Plaintiffs to arbitrarily uproot them after they relied upon that encouragement. Plaintiff HATHAWAY, for example, invested a large amount of money and energy in establishing an avocational laundry in the institution, which will be lost when he is transferred out of the institution.

d) The determination to transfer Plaintiffs will be noted on their institutional record and will be considered by the Parole Board, the Furlough Board and other administrative agencies of the Department of Correction, as a conviction on the merits of the disciplinary charges referred to in ¶14. This will have a continuing, deleterious effect upon Plaintiffs' attempts to gain parole, furlough, work release, and other privileges.

42. The punishment described above has been imposed or ordered in violation of the Plaintiffs' constitutional rights to minimal due process:

a) Notice was inadequate. Plaintiffs have not been informed of the charges against them, since the allegations of the disciplinary and classification reports are so vague as to be meaningless, and to make it impossible for Plaintiffs to marshal the facts and prepare a defense. For example, Plaintiff FANO is permitted to have a leather shop in the institution in which he uses and possesses, with the approval of M.C.I. Norfolk authorities, scissors, razors, knives, hammers, etc., yet he is charged with violating institution rules by having "instruments that might be used as weapons."

b) Notice was inadequate, since Plaintiffs were not informed of the evdence against them in that in every case there is only reference to an anonymous informant and a "reliable source."

c) Plaintiffs were not given a meaningful opportunity to respond, since it is impossible to make any defense to charges as vague as these beyond a bare assertion of innocence.

d) At the hearing, Plaintiffs were told nothing of the nature of the secret allegations against them. They were not told with whom they allegedly planned, nor when, nor specifically what they planned to do. They were not told what contraband they were supposedly in possession of. Therefore, they were not afforded a meaningful opportunity to respond.

e) Plaintiffs were denied a meaningful opportunity to respond in that the Classification Board had made its determination before Plaintiffs were given any opportunity whatsoever to respond.

f) The Classification Board did not take the most reliable evidence available to it, in that it did not call the informant before it but relied solely upon Defendant MEACHUM's unsworn, heavy statements. It also did not have an independent representative of the Board interview the informant to make an impartial finding of his reliability, nor was evidence adduced which corroborated the informant's charges. Therefore the finding of the Board was not based on reliable and substantial evidence.

g) The bare statement that the Board found the informant to be reliable is not a constitutionally sufficient explanation for its determination and does constitute a written statement of evidence and reasons for its decision required by due process.

h) Plaintiffs were denied a reasonable opportunity of review, since the Board refused to tape-record Defendant MEACHUM's statement.

43. The actions of Defendants as outlined in ¶11 through 41 *supra*, were directed at the Plaintiffs individually and severally and were taken under color of law.

44. Each Defendant is engaged in a pattern of conduct which violates Plaintiffs' constitutional rights and which will be continued unless judicial relief is granted.

45. Each Plaintiff has suffered and will continue to suffer immediate and irreparable injury and is in need of injunctive relief to protect his rights pending the litigation of this Complaint.

46. The granting of relief directing the Defendants to return Plaintiffs to general population at M.C.I. Norfolk until such time as the Defendants conduct hearings consistent with due process of law to determine Plaintiff's classification status will not substantially prejudice the Defendants. The failure to grant this relief, however, will allow a continuous and grievous loss to be suffered by Plaintiffs in violation of the United States Constitution.

WHEREFORE, PLAINTIFFS pray this Court:

1. Adjudge and declare that Defendants' actions in placing and keeping Plaintiffs in segregation without providing Plaintiffs with a hearing which considered the question of whether segregated confinement is appropriate, which then determined that such segregated confinement is appropriate, and which meets the procedural protections of due process, including, at a minimum, those protections outlined in Commissioner's Bulletin 72-1, violates Plaintiffs right to due process of law under the Fourteenth Amendment to the Constitution of the United States.

2. Adjudge and declare that Defendants' action in transferring Plaintiffs to more restrictive institutions without providing a hearing with the procedural due process protections outlined in ¶41 violates Plantiffs' right to due process of law under the Fourteenth Amendment to the Constitution of the United States.

3. Adjudge and declare that no member of Plaintiff class may be punished or subjected to administrative sanctions solely on the basis of secret informant information.

4. Adjudge and declare that no member of Plaintiff class may be punished or subjected to administrative sanctions unless he is first notified of the charges in specific enough terms that he can marshal the facts and prepare a meaningful defense to them.

5. Adjudge and declare that no member of Plaintiff class may be exposed to punishment or administrative sanctions unless he is informed of the evidence against him, except where the determining body is relying on informant information and that body can show that it is necessary to keep the identity of the informant secret to protect his life or health, in which case the body must inform the member of Plaintiff class of all information received which would not reveal the identity of the informant.

6. Adjudge and declare that no member of Plaintiff class may be punished or subjected to administrative sanctions unless the determining body makes the best practical independent investigation of the facts, and at the very least, the Board or its representative must question the informant.

7. Issue a temporary restraining order ordering Defendants to return Plaintiffs to general population at M.C.I. Norfolk immediately.

8. Issue a preliminary injunction ordering Defendants to return Plaintiffs to general population at M.C.I. Norfolk immediately, and to retain Plaintiffs at M.C.I. Norfolk until such time as Defendants provide Plaintiffs with a due process hearing on the question of transfer.

9. Issue a permanent injunction M.C.I. ordering Defendants to return Plaintiffs to general population at Norfolk until such time as Defendants provide Plaintiffs with a due process hearing on the question of transfer.

10. Issue a permanent injunction ordering Defendants to expunge from the records of Plaintiffs all reference to the disciplinary and classification and proceedings referred to in paragraphs 5, 14, and 21 through 33.

11. Award each Plaintiff judgment for $1000.00 in compensatory damages.

12. Award each Plaintiff judgment for $10,000 for punitive damages.

13. Grant Plaintiffs costs of prosecuting this action and reasonable attorneys' fees.

14. Order such other and further relief as this Court deems appropriate.

Dated: December 12, 1974

(s) Robert Stolzberg
Robert Stolzberg
Linda Olmstead
Roxbury Defenders Committee

126 Warren Street
Roxbury, Massachusetts 02119
(s) Richard Shapiro
Richard Shapiro
Timothy Wilton
Prisoner's Rights Project
2 Park Square
Boston, Massachusetts 02116
(617) 482-2773

Commonwealth of Massachusetts)
: SS.:
County of Suffolk)

The undersigned, attorneys admitted to practice in the courts of Massachusetts, show: that deponents are attorneys of record for plaintiffs in the within action; that deponents have read the foregoing complaint and know the contents thereof; that the same is true to deponents' own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further states that the reason this verification is made by deponent and not by the plaintiff is due to plaintiffs' incarceration at M.C.I., Norfolk.

The grounds of deponents' belief as to all matters not stated upon deponents' knowledge are as follows: personal interviews with plaintiffs and defendants.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: December 12, 1974
Roxbury, Massachusetts

(s) Robert Stolzberg
Robert Stolzberg
Attorney for the Plaintiffs

EXHIBIT 1

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-25-74 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Arthur Fano
No. N21031 Report No. 74-366

Offense: Using threatening or any other improper language toward any other inmate.
Passing or receiving contraband from other inmates.

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI Norfolk which posed a significant threat to person, property and security, it has been determined through a reliable source that Arthur Fano used threatening language toward other inmates, and that he possessed certain instruments that might be used as weapons, and further that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 2

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Richard Debrosky
No. N-19566 Report No. 74-372

Offense: (10) Making or having in your Possession any type of dangerous weapon

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI—Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Richard Debrosky was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 3

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Robert Dussault
No. N-20427 Report No. 74-368

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY
(s) J. E. MURPHY, *ADS*
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI—Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Robert Dussault was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 4

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-25-74 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: David Hathaway
No. N-20664 Report. No. 74-374

Offense: (7) Willfully disfiguring or damaging any part of the institution

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of serious fires within MCI Norfolk which caused considerable property damage, and posed a very real threat to personal safety, it has been determined through reliable sources that David Hathaway has been significantly involved in the planning and execution of one or more of these fires.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 6

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Charles Royce
No. N-21546 Report No. 74-370

Offense: (16) Passing or Receiving Contraband from other inmates or visitors
(26) Possession of Narcotics, barbiturates and/or amphetamines

You are hereby notified that you will be seen by the Disciplinary Board/Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY, *ADS*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI—Norfolk which posed a significant threat to person, property, and security, it has been determined through a very reliable source that Charles Royce was involved in the trafficing of Contraband in the institution.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: _____
Officer's recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 7

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Arthur Fano
Date: November 4, 1974

Notice of Classification Hearing

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.

These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON *(BG)*
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

/lt

EXHIBIT 8

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Robert Dussault
Date: November 4, 1974

Notice of Classification Hearing

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons or ammunition and that you had joined in plans to use these contraband items.

These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting area, pending a hearing, was necessary.

(s) LARRY SOLOMON *(BG)*
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

/lt

EXHIBIT 9

[Letterhead — ROXBURY DEFENDERS COMMITTEE, INC.]

November 13, 1974

Mr. Frank A. Hall
Commissioner
The Commonwealth of Massachusetts
Department of Correction
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Re: *David Hathaway*

Dear Sir:

I am writing on behalf of Mr. David Hathaway to appeal the Departmental Classification Review Board's determination of November 8, 1974, to transfer Mr. Hathaway from M.C.I., Norfolk, to M.C.I., Bridgewater.

Mr. Hathaway faced serious deprivations based on what were essentially disciplinary charges. His transfer from M.C.I., Norfolk, where he has built up a flourishing laundry business in which he has a sizable investment and which he will, under the circumstances, find it difficult if not impossible to successfully liquidate, will work a grave hardship upon him. Therefore, he is guaranteed by the United States Constitution due process, which he did not receive:

1) Since the hearing was predicted upon disciplinary charges the accuracy of which had never been determined, the hearing was illegitimate *per se*.

2) He did not receive notice of the charges against him, in that the notification given him was so vague and conclusory, not specifying what contraband "instruments, or materials" he allegedly possessed, nor when he possessed them; not specifying with whom, when and where he "had

joined in plans to use these contraband items;" and not specifying what the alleged conspirators planned to do.

3) The Board did not take the best evidence available, in that it admittedly based its decision solely upon the hearsay testimony of Superintendent Meachum, rather than calling the "reliable source" to testify, despite Mr. Hathaway's request that they do so.

4) He was not given any indication of the evidence against him, beyond the bare assertion that there was "a reliable source."

5) The Board refused to allow Mr. Hathaway, or his representative, the opportunity to hear any evidence given against him; it further refused to recapitulate the evidence against him. This effectively denied him any opportunity to respond, as well as denying him an opportunity to confront or cross-examine adverse witnesses.

6) The Board stated that it had determined that the source of the charges were reliable before it heard from Mr. Hathaway, thereby depriving him of the opportunity to have a meaningful input in the determination of the most important issue.

7) The bare statement that the Board found the informant to be reliable is not a sufficient explanation of the reasons for its determination.

8) Mr. Hathaway was denied a reasonable opportunity to appeal, because the Board refused to tape-record Superintendant Meachum's statement, thus preventing the reviewing body from having the opportunity to review the key element of the proceeding. The Board's refusal was made despite Mr. Hathaway's acceptance of the condition that the tape would remain in the custody of the Department of Correction, and that neither Mr. Hathaway nor his representatives would have access to the tape.

9) Mr. Hathaway's institutional record is excellent. He

has had no disciplinary reports, and he submitted to the Board a highly favorable letter from his supervisor on his institutional job. His Social Worker, Mr. Jack Jackson, told the Board that in his role as unit representative he had been instrumental in the past in keeping tensions under control at M.C.I. Norfolk, and preventing disturbances.

For the above-stated reasons, we respectfully urge you to reverse the Board's determination to transfer Mr. Hathaway to M.C.I., Bridgewater, and to restore him to general population at M.C.I., Norfolk.

Sincerely yours,
ROBERT A. STOLZBERG
Staff Attorney

RAS:mw
cc: David Hathaway

EXHIBIT 10

November 15, 1974

Mr. Frank A. Hall
Commissioner
The Commonwealth of Massachusetts
Department of Correction
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Re: Arthur Fano

Dear Sir:

I am writing on behalf of Mr. Arthur Fano to appeal the Departmental Classification Review Board's determination of November 11, 1974, to transfer Mr. Fano from M.C.I., Norfolk, to M.C.I., Walpole.

Since Mr. Fano faced, and in fact received, serious depri-

vations based on what were essentially disciplinary charges, he is guaranteed by the United States Constitution due process, which he did not receive:

1) Since the hearing was predicated upon disciplinary charges, the accuracy of which has never been determined, the hearing was illegitimate *per se.*

2) He did not receive notice of the charges against him, in that the notification given him was so vague and conclusory, not specifying what contraband "instruments, or materials" he allegedly possessed, nor when he possessed them; not specifying with whom, when and where he "had joined in plans to use these contraband items;" and not specifying what the alleged conspirators planned to do.

3) The Board did not take the best evidence available, in that it admittedly based its decision solely upon the hearsay testimony of Superintendent Meachum, rather than calling the "reliable source" to testify, despite Mr. Fano's request that they do so. The board further refused Mr. Fano's offer to take a lie-detector test, as the best available method of determining the accuracy of the charges against him.

4) He was not given any indication of the evidence against him, beyond the bare assertion that there was "a reliable source."

5) The Board refused to allow Mr. Fano, or his representative, the opportunity to hear any evidence given against him; it further refused to recapitulate the evidence to respond, as well as denying him an opportunity to confront or cross-examine adverse witnesses.

6) The Board determined that the source of the charges were reliable before it heard from Mr. Fano, thereby depriving him of the opportunity to have a meaningful in-put in the determination of the most important issue.

7) The bare statement that the Board found the inform-

ant to be reliable is not a sufficient explanation of the reasons for its determination.

8) Mr. Fano was denied a reasonable opportunity to appeal, because the Board refused to tape-record Superintendant Meachum's statement, thus preventing the reviewing body from having the opportunity to review the key element of the proceeding. The Board's refusal was made despite Mr. Fano's acceptance of the condition that the tape would remain in the custody of the Department of Correction, and that neither Mr. Fano, nor his representatives would have access to the tape.

9) Mr. Fano's institutional record is excellent. He has had only one minor disciplinary report. He also presented the testimony of Mr. William Leonard, the Athletic Director, who stated that Mr. Fano had always been very fair and helpful in their dealings, and had worked hard and never caused any trouble. In light of this, he should have been restored to general population at M.C.I., Norfolk.

For the above-stated reasons, we respectfully urge you to reverse the Board's determination to transfer Mr. Fano to M.C.I., Walpole, and to restore him to general population at M.C.I., Norfolk.

Sincerely yours,
ROBERT A. STOLZBERG
Staff Attorney

RAS:mt
cc: Arthur Fano
M.C.I., Norfolk
Box 43
Norfolk, Massachusetts

EXHIBIT 11

November 13, 1974

Mr. Frank A. Hall
Commissioner
The Commonwealth of Massachusetts
Department of Correction
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Re: *Robert Dussault*

Dear Sir:

I am writing on behalf of Mr. Robert Dussault to appeal the Departmental Classification Review Board's determination of November 8, 1974, to transfer Mr. Dussault from M.C.I., Norfolk, to M.C.I., Walpole.

Since Mr. Dussault faced, and in fact received serious deprivations based on what were essentially disciplinary charges, he is guaranteed by the United States Constitution due process, which he did not receive:

1) Since the hearing was predicated upon disciplinary charges the accuracy of which had never been determined. the hearing was illegitimate *per se.*

2) He did not receive notice of the charges against him, in that the notification given him was so vague and conclusory, specifying what contraband "instruments, or materials he allegedly possessed, nor when he possessed them; not specifying with whom, when and where he had joined in plans to use these contraband items;" and not specifying what the alleged conspirators planned to do.

3) The Board did not take the best evidence available, in that it admittedly based its decisions solely upon the hearsay testimony of Superintendent Meachum, rather than calling the "reliable source" to testify, despite Mr. Dussault's request that they do so.

4) He was not given any indication of the evidence against him, beyond the bare assertion that there was "a reliable source."

5) The Board refused to allow Mr. Dussault of his representative the opportunity to hear any evidence given against him; it further refused to recapitulate the evidence against him. This effectively denied him any opportunity to respond, as well as denying him an opportunity to confront or cross-examine adverse witnesses.

6) The Board stated that it had determine that the source of the charges was reliable before it heard from Mr. Dussault, thereby depriving him of the opportunity to have a meaningful in-put in the determination of the most important issue.

7) The bare statement that the Board found the informant to be reliable is not a sufficient explanation of the reasons for its determination.

8) Mr. Dussault's institutional record is excellent. He has had no disciplinary reports for five years, and he submitted to the Board a highly favorable letter from his supervisor on his institutional job. In light of this, he should have been restored to general population at M.C.I., Norfolk. If this was impossible, he should have been transferred to Monroe or Walpole.

For the above-stated reasons, we respectfully urge you to reverse the Board's determination to transfer Mr. Dussault to M.C.I., Walpole, and to restore him to general population at M.C.I., Norfolk. If, for any reason, this is impossible, we urge you to modify their decision and order his transfer to Monroe, or Concord.

Sincerely yours,
Robert A. Stolzberg
Staff Attorney

rs:mw
cc. Robert Dussault

EXHIBIT 12

November 15, 1974

Mr. Frank A. Hall
Commissioner
The Commonwealth of Massachusetts
Department of Correction
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Re: Richard DeBrosky

Dear Sir:

I am writing on behalf of Mr. Richard DeBrosky to appeal the Departmental Classification Review Board's determination of November 13, 1974, to transfer Mr. DeBrosky from M.C.I., Norfolk to M.C.I., Bridgewater.

Mr. DeBrosky faced serious deprivations based on what were essentially disciplinary charges. He had adjusted extremely well to Norfolk, where he greatly benefited from his job of visiting room attendant, and photographer. His transfer from Norfolk will work grave hardship upon him, and he is, therefore, guaranteed due process by the United States Constitution. Due Process was not, however, afforded:

1) Since the hearing was predicated upon disciplinary charges, the accuracy of which had never been determined, the hearing was illegitimate *per se.*

2) He did not receive notice of the charges against him, in that the notification given him was so vague and conclusory, not specifying what contraband "instruments, or materials" he allegedly possessed, nor when he possessed them; not specifying with whom, when and where he "had joined in plans to use these contraband items;" and not specifying what the alleged conspirators planned to do.

3) The Board did not take the best evidence available, in that it admittedly based its decision solely upon the

hearsay testimony of Superintendent Meachum, rather than calling the "reliable source" to testify.

4) He was not given any indication of the evidence against him, — beyond the bare assertion that there was "a reliable source."

5) The Board refused to allow Mr. DeBrosky, or his representative, the opportunity to hear any evidence given against him; it further refused to recapitulate the evidence against him. This effectively denied him any opportunity to confront or cross-examine adverse witnesses.

6) The bare statement that the Board found the informant to be reliable is not a sufficient explanation of the reasons for its determination.

7) Mr. DeBrosky was denied a reasonable opportunity to appeal, because the Board refused to tape-record Superintendant Meachum's statements, thus preventing the reviewing body from having the opportunity to review the key element of the proceeding. The Board's refusal was made despite Mr. DeBrosky's acceptance of the condition that the tape would remain in the custody of the Department of Correction, and that neither Mr. DeBrosky, nor his representatives would have access to the tape.

8) Mr. DeBrosky's institutional record is excellent. He has had no disciplinary reports for over four years, and has completed ten successful furloughs. In light of this, he should have been restored to general population at M.C.I., Norfolk.

For the above-stated reasons we respectfully urge you to reverse the Board's determination to transfer Mr. DeBrosky to M.C.I., Bridgewater, and to restore him to general population at M.C.I., Norfolk.

Sincerely yours,
Robert A. Stolzberg
Staff Attorney

RAS:mt
cc: Richard DeBrosky

EXHIBIT 13

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

November 21, 1974

Robert Stolzberg, Staff Attorney
Roxbury Defenders Committee, Inc.
124-126 Warren Street
Roxbury, Mass. 02119

RE: Robert Dussault, Arthur Fano, and
David Hathaway

Dear Mr. Stolzberg:

The Commissioner has received your requests for appeal concerning the recommendations forwarded to him by the Departmental Classification Review Boards which met at MCI-Norfolk. He has forwarded this correspondence to me for reply.

Your requests for appeal are being denied. After a thorough review of the facts, with considerable thought and evaluation being given to the issue of intelligence information and its reliability, it has been decided that the recommendations of the board will be implimented.

It is my belief that departmental policy concerning the introduction of intelligence information was adhered to during the hearings.

If you so desire, you may have access to the tapes of the proceedings in our central office. For the purpose of making necessary arrangements you may contact Edward Brewer, Attorney (727-3324).

Thank you for your concern.

Sincerely yours,
(s) WILLIAM C. DAWBER
WILLIAM C. DAWBER
Acting Deputy Commissioner
for Classification and Treatment

cc: Edward Brewer
File

EXHIBIT 14

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

November 26, 1974

Ms. Linda Olmstead, Attorney
Roxbury Defenders Committee Inc.
124-126 Warren Street
Roxbury, MA 02119

RE: Richard McPherson

Dear Ms. Olmstead:

The Commissioner has received your request for appeal concerning the recommendations forwarded to him by the Departmental Classification Review Board which met at MCI-Norfolk on 1-13-74 concerning Richard McPherson. He has forwarded this correspondence to me for reply.

Your request for appeal is being denied. After a thorough review of the facts, with considerable thought and evaluation being given to the issue of intelligence information and its reliability, it has been decided that the recommendations of the Board will be implemented.

It is my belief that Departmental policy concerning the introduction of intelligence information was adhered to during the hearings.

Sincerely yours,
(s) WILLIAM C. DAWBER
WILLIAM C. DAWBER, MSW, ACSW
Acting Deputy Commissioner
for Classification and Treatment

WCD:td
cc: Central File

EXHIBIT 15

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

November 26, 1974

Robert Stolzberg, Staff Attorney
Roxbury Defenders Committee, Inc.
124-126 Warren Street
Roxbury, MA 02119

RE: Richard DeBrosky

Dear Mr. Stolzberg:

The Commissioner is in receipt of your correspondence of 11-15-74 concerning your request for appeal of the recommendations forwarded to him by the Departmental Classification Review Board which met at MCI-Norfolk of 11-13-74 in regards to Richard DeBrosky. He has forwarded this correspondence to me for reply.

As you are aware, the recommendation of the Board was for placement at MCI-Bridgewater. However, after a thorough review of the facts, with considerable concern being given to the intelligence information that connected Mr. DeBrosky with involvement with a weapon, the Commissioner has decided to place Mr. DeBrosky at MCI-Walpole. The intelligence information referred to above was judged to be reliable. Your request that the subject be placed back into the population at MCI-Norfolk is being denied.

It is my belief that departmental policy concerning the introduction of intelligence information was adhered to during the hearing.

Sincerely yours,
(s) WILLIAM C. DAWBER
WILLIAM C. DAWBER, MSW, ACSW
Acting Deputy Commissioner
for Classification and Treatment

WCD:td
cc: File

EXHIBIT 16

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

Date: Nov. 21, 1974

Resident's Name: Charles Royce
Location: MCI, Norfolk
RE: Decision on Present Classification Status

Dear Mr. Royce:

I have received the recommendations of the:

[ ] Community-Based Reclassification Committee
[ ] Inter-Institutional Reclassification Committee
[x] Departmental Review Board

that was convened at MCI, Norfolk on 11-6-74 to review your current classification status, including placement.

Upon careful examination of all related materials and information, I have reached the following decision:

Placement: MCI, Walpole

Reasons: I disagree with the recommendation of the Board and I am assigning you to MCI, Walpole because I feel that you have demonstrated that you are unwilling and/or unable to accept the responsibility that is comensurate with assignment to MCI, Norfolk, a medium security facility. Your actions of Nov. 1, 1974 whereby you destroyed state property and displayed disrespect to a Correctional Officer have played a part in this decision.

Very truly yours,
(s) FRANK A. HALL
FRANK A. HALL, *Commissioner*

cc: William Dawber
Larry Meachum
Walt Waitkevich
File

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

MOTION FOR IN CAMERA INSPECTION OF EVIDENCE AND FOR THE ISSUANCE OF A PROTECTIVE ORDER RELATING TO SUCH EVIDENCE

Now come the defendants in the above-entitled matter and, by their attorney, move this Court to allow the defendants to present documentary evidence *in camera,* which evidence consists of information obtained from informants at MCI, Norfolk, substantially identifying those informants and bearing directly upon that behavior of the plaintiffs which formed the basis for the actions taken by the defendants which are the focal point of the instant complaint. Defendants maintain that such evidence may not be devulged, directly or indirectly, to either the plaintiffs or their counsel without creating a substantial risk of grievous injury and loss of life to the particular informants involved.

Respectfully,
ROBERT H. QUINN
Attorney General
(s) WILLIAM T. HAROLD, III
WILLIAM T. HAROLD, III
Deputy Assistant Attorney General

Denied 12-20-74
(s) ILLEGIBLE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
[TITLE OMITTED IN PRINTING]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN ATTORNEYS OF THE RESPECTIVE PARTIES THAT (NUMBERS CORRESPOND TO PARAGRAPHS IN THE AMENDED COMPLAINT):

3. Plaintiffs ARTHUR FANO, RICHARD DE BROSKY, ROBERT DUSSAULT, DAVID HATHAWAY, RICHARD MC PHERSON and CHARLES ROYCE are all inmates of Massachusetts Correctional Institutions, serving sentences imposed by the Courts of Massachusetts.

4. Defendant LARRY MEACHUM is the Superintendent of M.C.I., Norfolk and, as such, is responsible under state law for the overall supervision, management, and control of M.C.I. Norfolk, including the immediate responsibility for the discipline and classification of inmates confined therein. He is being sued in his individual and official capacities.

5. Defendant FRANK HALL is the Commissioner of Correction for the Commonwealth of Massachusetts and, as such, is responsible under state law for the policies and procedures for determining and reviewing the classification status of Plaintiffs, and is also ultimately responsible for developing and implementing classification, as well as disciplinary policies and procedures. He is being sued in his individual and official capacities.

6. Defendant WILLIAM DAWBER was Acting Deputy Commissioner for Classification and Treatment from November 9, 1974, until December 13, 1974, and, as such, was responsible during that period for formulating and supervising the policies and procedures for classification. Defendant DAWBER is being sued in his individual and official capacities. His successor in office is DAVID HALEY.

11. Plaintiff RICHARD MC PHERSON was taken from

M.C.I., Norfolk general population on or about October 16, 1974, and placed in a cell in the Receiving Building at M.C.I., Norfolk (hereinafter the R.B.). He did not receive any written notice or hearing prior to being placed in the R.B.

12. Plaintiffs ARTHUR FANO, RICHARD DE BROSKY, ROBERT DUSSAULT, DAVID HATHAWAY and CHARLES ROYCE were taken from general population at M.C.I., Norfolk on October 24, 1974, and placed in cells in the R.B. They were not provided with any prior written notice of the reason for their placement in the R.B. nor with any hearing prior to their placement therein.

13. On October 25, 1974, the Plaintiffs' attorneys spoke with Defendant MEACHUM. At that time he assured Plaintiffs' attorneys that by the end of that day the men in the R.B. would be given disciplinary reports or be released from the R.B.

14. On October 25, 1974, Plaintiffs were given disciplinary reports. Each was signed by Defendant MEACHUM.

14a) through 14e). Exhibits 1, 2, 3, 4, and 6 are accurate and authentic.

14f). Exhibit 6A, attached hereto, is an accurate and authentic copy of the notice given to Plaintiff Mc PHERSON.

15. Each of the above cases was referred to the District Attorney's office for investigation and prosecution pursuant to M.G.L. ch. 127 §38C.

16. On or about October 30, 1974, Plaintiffs' attorneys spoke with Defendant MEACHUM's agents, Susan Richmond and Deputy Superintendent John Murphy, and requested, on Plaintiffs' behalf, that a hearing be held to determine Plaintiffs' custody status.

17. On or about November 25, 1974, Defendant MEACHUM received a letter from the District Attorney's Office, stating, in part, that his investigation "has not at this time revealed sufficient evdence against these subjects [including Plaintiffs in the instant case] to proceed against them criminally".

18. No disciplinary hearing pursuant to Commissioner's Bulletin 72-1 has been held on the charges referred to in Paragraph 14 of the Amended Complaint.

19. Being placed in the R.B. instead of general population, changes the conditions of Plaintiffs' confinement, to wit:

a) Plaintiffs were locked in their cells 23 hours a day, although in general population inmates are never locked in their cells.

b) Plaintiffs were not permitted to have their personal property, including radios or televisions, that they could have in general population.

c) The only facility for washing clothes in the R.B., other than the showers, is the sink in each Plaintiff's cell, unlike the laundry service they could use in general population.

d) Plaintiffs are allowed to exercise for one hour every other day. This time is restricted to a fenced-in area on the roof. In general population, there are baseball, football, basketball, handball, and other recreational facilities, and depending upon his schedule an inmate can spend eight or more hours per day using these facilities.

e) Plaintiffs are not permitted access to the rest of the prison population.

f) Plaintiffs are not permitted to take part in prison programs for their rehabilitation, including school and work programs, unlike inmates in general population. They are denied the wages they could earn were they allowed to work.

g) Plaintiffs are not allowed to go to the canteen as are members of general population.

20. On November 4, 1974, Plaintiffs filed the original complaint in this case, asking for a Temporary Restraining Order and other relief, Plaintiffs notified Defendant MEACHUM's counsel, Robert Bell, Esq., Chief Counsel for the Department of Correction, of the action.

21. On the evening of November 4, 1974, Plaintiffs were served with notice that they would receive classification hearings before a Department Review Board pursuant to Department Order 4400.1, to determine Plaintiffs' custody status and possible transfer.

21a. Exhibits Nos. 8A, 8B, 8C, and 8D, attached hereto, are authentic and accurate copies of the classification notices received by Plaintiffs DE BROSKY, HATHAWAY, MC PHERSON, and ROYCE.

21c. Exhibit 8E, attached hereto, is an authentic and accurate copy of Department Order 4400.1 §6.4.

22. On November 6, 8, 11, 13, and 14, 1974, Plaintiffs' classification hearings were held. At each hearing the procedure was basically the same. Each Plaintiff was allowed to tape record the hearing, provided that the Department of Correction maintained control of the tapes afterwards.

23. The Board opened each hearing by reading a prepared statement. It then ordered the Plaintiff, and his representative, to leave the room, while it took unsworn, hearsay testimony from Defendant MEACHUM, which, the Board stated, consisted of informant information concerning Plaintiffs. In each case the Board:

a) Refused to call and question the informant, and relied instead upon the hearsay testimony of Defendant MEACHUM. The Board stated it had inquired into the reliability of the informant or informants.

b) Refused to tape-record Defendant MEACHUM's testimony, after Plaintiffs agreed that they would not have access to that part of the tape, but merely wanted

to preserve a record for a possible review of the proceedings. The Board stated that it would take notes of Defendant MEACHUM's testimony.

c) Defendant MEACHUM's testimony was not taken under oath.

24. After Defendant MEACHUM has completed his testimony and left, each Plaintiff was brought back into the hearing. In at least one case, that of Plaintiff DUSSAULT, the Board stated that it had determined on the basis of Defendant MEACHUM's testimony that the anonymous informant was reliable before hearing any testimony presented by Plaintiff.

25. The Board informed Plaintiffs only that Defendant MEACHUM's testimony supported the allegations contained in the notices.

26. The Board then heard evidence from each Plaintiff's social workers, and any witnesses he could produce. The Board refused to compel any officers to appear and testify in behalf of Plaintiffs as they had requested. Certain officers voluntarily appeared before the Board or submitted written statements on behalf of certain Plaintiffs.

28. Each Plaintiff denied to the Board any activity alleged in the disciplinary charges and in the notice of the classification hearing.

29. At the conclusion of each hearing, the Board announced its recommendations:

a) DAVID HATHAWAY was to be transferred to M.C.I. Bridgewater.

b) ARTHUR FANO was to be transferred to M.C.I. Walpole.

c) ROBERT DUSSAULT was to be transferred to M.C.I. Walpole.

d) RICHARD DE BROSKY was to be transferred to M.C.I. Bridgewater.

e) Richard Mc Pherson was to be transferred to M.C.I. Walpole.

f) Charles Royce was to be held in administrative segregation for 30 days and be given a second classification hearing at the end of 30 days.

30. Plaintiffs were not given a written statement of the reasons for the Board's action, nor of the evidence relied upon. Plaintiffs were orally informed by the Board that its recommendations were based upon informant information presented by Defendant Meachum.

31. Despite their request, Plaintiffs were not allowed to see the report later prepared by the Board to Defendant Hall recommending their transfer, nor were they informed of its contents beyond the statement referred to in Stipulation 30. Under Department Order 4400.1 §6.4, (Exhibit 8E), a written report was sent to Defendant Dawber, who reviewed it and forwarded it to Defendant Hall for his decision.

32. Each Plaintiff except Royce appealed to the Commissioner to review the Board's determination and to order that he be placed in general population at M.C.I. Norfolk. Exhibits 9 through 12, attached to Amended Complaint, are accurate an authentic. A review was personally made by Defendants Hall and Dawber. They did not make an independent investigation other than by speaking with members of the Classification Board and possibly Defendant Meachum. Defendants Hall and Dawber do not recall the details of those conversations. Except for such conversations, Defendants Hall and Dawber relied wholly upon the reports of the Classification Board. Attached here as Exhibit 12A through 12F. Exhibit 12A through 12F are authentic. They did not listen to the tape recordings made of some of the hearings. Each appeal was denied:

a) In the case of Plaintiffs Fano, Dussault, Hathaway and Mc Pherson the Classification Board recommendation was upheld. Exhibit Nos. 13 and 14, attached to Amend Complaint are accurate and authentic.

b) In the case of Plaintiff De Brosky, the recommendation of the Board to transfer Plaintiff to M.C.I. Bridgewater was overturned and he was ordered transferred to M.C.I. Walpole. Exhibit No. 15, attached to Amended Complaint, is accurate and authentic.

c) Defendants Hall and Dawber reviewed Plaintiff Royce's case and decided to transfer him to M.C.I., Walpole. Exhibit No. 16, attached to Amended Complaint, is authentic and accurate.

33. Plaintiffs have not been given a written statement of the reasons for the Commissioner's decision, nor of the evidence relied on in making that decision, beyond the statements in Exhibits 13 through 16, attached to Amended Complaint.

34. On or about November 1, 1974, Plaintiff De Brosky was transferred to the hospital at M.C.I. Norfolk for medical reasons. There he was kept in a status substantially similar to that of the R.B. until about November 18, 1974, when he was allowed on the general ward. He is now awaiting transfer to M.C.I. Walpole. Defendants continued to keep all other Plaintiffs in the R.B. until they transferred Plaintiffs to M.C.I., Walpole. Plaintiffs Dussault and Royce on November 25, 1974. Plaintiff Fano on November 26, 1974 and Plaintiff Mc Pherson on December 2, 1974. Plaintiff Hathaway remains in the R.B. and is awaiting transfer.

36. The Classification Board did not make any recommendation concerning detention in the R.B.

41a). M.C.I., Norfolk is a medium security institution,

whereas M.C.I., Walpole is a maximum security institution. The security at M.C.I., Walpole is stricter than at M.C.I., Norfolk. M.C.I., Walpole offers fewer rehabilitative programs such as educational and work-release opportunities than M.C.I., Norfolk. It is more difficult to obtain furloughs at M.C.I., Walpole than M.C.I., Norfolk.

b). M.C.I., Norfolk is a medium security institution. Parts of M.C.I., Bridgewater are maximum security. Therefore, at the latter Plaintiffs may be subject to stricter security measures than at M.C.I., Norfolk. M.C.I., Bridgewater is a much older institution than M.C.I., Norfolk. It has fewer rehabilitative programs, than M.C.I., Norfolk.

d). The determination to transfer Plaintiffs, and the basis therefor, will be noted on their institutional record and will be considered by the Parole Board, the Furlough Board and other administrative agencies of the Department of Correction. This may affect Plaintiffs' attempts to gain parole, furlough, work release, and other privileges.

43. The actions of Defendants herein stipulated were taken under color of law.

ROBERT A. STOLZBERG, ESQ.
Roxbury Defenders Committee, Inc.
124 Warren Street
Roxbury, Massachusetts 02119
ROBERT QUINN, ESQ.
Attorney General
131 Tremont Street
Boston, Massachusetts

By

WILLIAM T. HARROD, III, ESQ.
Assistant Attorney General
Criminal Division

Dated: Boston, Massachusetts
December 20, 1974

EXHIBIT 6A

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-25-74 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Richard Mc Pherson
No. N21608 Report No. 74-383

Offense: Willfully disfiguring or damaging any part of the institution or any material or tool.

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on ——— at ——— o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND
SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of serious fires within MCI Norfolk which caused considerable property damage and posed a very real threat to personal safety, it has been determined through reliable sources that Richard Mc Pherson willfully damaged State property and that he has been significantly involved in the planning and execution of one or more of these fires.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: ———
Officer's recommendation: ———
Supervising Officer's comment and review: ———
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 8A

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Richard DeBrosky
Date: November 4, 1974

NOTICE OF CLASSIFICATION HEARING

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.

These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

(s) RICHARD DEBROSKY

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

EXHIBIT 8B

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: David Hathaway
Date: November 4, 1974

NOTICE OF CLASSIFICATION HEARING

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring with MCI Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

Resident notified — Copy handed to Resident.
11-4-74 (s) ILLEGIBLE

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

EXHIBIT 8C

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Richard McPherson
Date: November 4, 1974

NOTICE OF CLASSIFICATION HEARING

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring with MCI Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

Resident notified — Copy handed out to Resident.
11-4-74 (s) ILLEGIBLE

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

EXHIBIT 8D

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Charles Royce
Date: November 4, 1974

NOTICE OF CLASSIFICATION HEARING

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI Norfolk, (narcotics, barbiturates and/or amphetamines.) This occurred during a period of serious unrest at MCI Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI Norfolk as well as serious property damage.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

Resident notified — Copy handed out to Resident.
11-4-74 (s) ILLEGIBLE

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner

EXHIBIT 12A

SUMMARY AND RECOMMENDATION
OF CLASSIFICATION PROCEEDING

Institution/Facility: MCI Norfolk Date: Nov. 8, 1974

[ ] Inter-Institutional
[ ] Community-Based
[x] Departmental Review Board
[ ] Other (specify) ———————

Resident's Name: Robert Dussault Number: N 20427
age: 34 PE 1-17-75

Recommendation:
Placement: MCI Walpole
Conditions: None

Narrative: Attorney Robert Stolzberger;
Roxbury Defenders Comm.
Interview was not taped.

The order of the hearing was a general overview of the proceedings opening with an introduction of the members of the committee and the reading of a prepared statement as to the purpose of the hearing. Mr. Dussault and his attorney were then advised that Mr. Larry Meachum, Supt. of MCI Norfolk, would be called to present informant information in closed session. Mr. Stolzberger presented a formal objection to the presentation of such material. Objection was duly noted for the record. Mr. Stolzberger then asked to remain during Mr. Meachum's report to the committee. Request was denied.

Mr. Stolzberger then made the following statement: "I believe the board is improperly convened and take part under protest."

Chairman duly noted protest, and Mr. Dussault and attorney left room. Mr. Larry Meachum arrived and presented his informant information and a review of the reliability of sources. That material is found in final part of this report.

When Mr. Meachum left, Mr. Dussault and his attorney returned. The hearing was re-opened with a reading of the notice of Classification Hearing as delivered to Mr. Dussault. Mr. Belcher asked of Mr. Dussault his feeling and beliefs as regards the notice, and the charges. Mr. Dussault denied categorically all charges, but stated that he feels that he has been too outspoken re: administration. He stated that the only "weapons" that he had had contact with are tools of his trade (plumber) a wrench, a screwdriver, a hammer, etc. Notice was served to Mr. Dussault that the committee regarded the sources as presented by Mr. Meachum as reliable. "We have heard information which links you to the existance of weapons and contributing to unrest at MCIN"

Mr. Stolzberger again objected. Ms. Briana Murphy, Social Worker, then presented the following social and criminal history:

Brief Criminal History:

History began with juvenile record in 1954 with B & E and Larceny. In 1958, he became adjudicated as an adult, and between that time and 1964, he served four H of C sentences and in 1964, was sentenced to MCI Walpole. In 3/65 he was transferred to Forestry, and was paroled in 10/65. He was returned a parole violation 7/66, and was released at end of time in Dec. 1966.

Current Sentence: PE 1-17-75

2-26-68 (eff 9-67) Sentenced & Adm to MCI Walpole;
Charges; A-O all Robbery — Armed Robbery, masked — governing sentence & charge: Accessory before the fact to confining for purpose stealing from bank — 15-30 yrs
3-7-72: Transferred to Monroe
9-26-72; Escape from Monroe
11-10-72; Returned to MCI Walpole (1-19-73 1 yr F&A to be served at Greenfield H of C)
8-73; 1/3 denied

12-13-73; Transferred to MCI Norfolk

Mr. Dussault has been working as a plumber and works for someone who has a driftwood avocation: In 1969, he attained GED at MCI Walpole. He has had no DR's since return from Monroe and at one time, was a member of Inmate council.

The social worker gave her impressions as "certain amount of savvy and social grace" has accepted 20 years of institutionalization . . . long record of stealing . . . takes a conservative look at prisons . . .

Mr. Dussault has not had any furloughs although the committee approved (only by 3/2 vote) the superintendent denied because of closeness of vote.

The subject himself reported that his feeling was denial and close vote prompted by personality clashes with house officers.

Mr. Stolzberger offered a letter of recommendation from Mr. Charles Ristaino, Plumber. (attached) He then again started to present a statement against informant information use — the chairman ruled against the statement by reminding him that his earlier objection had been duly noted. He then made a statement that Mr. Dussault had been a productive member of this society and work is considered a rehabilitative tool — he has worked — and therefore he has fulfilled his responsibility. Statement entered.

Informant information excised

Informant information excised

Reasons for decision:

1. The "reliable sources" were deemed acceptable as reliable because they had produced truthful and verifiable information prior to incidents, which were then avoided and serious harm prevented.
2. Mr. Dussault has not made significant use of program facilities at MCI Norfolk. He has, in effect only been doing time.

To Mr. Dussault & Attorney:

"There is sufficient & significant information that has been made available to the committee that indicates to us that you have placed yourself in a situation at MCI Norfolk so that adequate programming cannot be provided at this time."

Respectfully Submitted,

SELMA K. CHARIF MCIF
Chairman
Roy Belcher, DOC
Charles Soares, MCI Bridgewater

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmates's Name: Robert Dussault
No. N-20427 Report No. 74-268

Offense: (10) Making or having in your possession any type of dangerous weapon

You are hereby notified that you will be seen by the Disciplinary Board officer at the next sitting to be held on ———— at ——— o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY
Disciplinary Officer

Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES

(Attach supplementary sheet if necessary)

After a series of problems within MCI-Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Robert Dussault was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: ———————————

Officer's recommendation: ———————————

Supervising Officer's comment and review: ———————

Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

———————

8 Nov. 74

To: Whom it May Concern
From: Mr. Charles Ristaino, Plumber, Maintenance #2
Subject: Robert Dussault

Robert Dussault has worked for me in Maintenance #2 (as a plumber) for some nine months. During this time, this man has been a good and dependable worker in all respects. He is competent in his work, and is reliable on the job.

This man has never been a problem of any kind in the shop. Within the scope of my knowledge, he has functioned well in this institution. He has been designated as Tunnel Plumber in recent months, and does a difficult job especially well.

(s) CHARLES RISTAINO
MR. CHARLES RISTAINO
Plumber, Maintenance #2

———————

EXHIBIT 12B

SUMMARY AND RECOMMENDATION OF CLASSIFICATION PROCEEDING

Institution/Facility: MCI Norfolk Date: Nov. 11, 1974

[ ] Inter-Institutional
[ ] Community-Based
[x] Departmental Review Board
[ ] Other (specify) ———————

Resident's Name: Arthur Fano Number: N 21031
age: 38 PE 9-10-82

Recommendation:
Placement: MCI Walpole
Conditions: None

Information to Mr. Fano: We considered the informant information sufficient and serious enough to link you with recent unrest at MCIN. We feel that this involvement would make it impossible for you to pursue a beneficial program at MCIN at this time.

Narrative: Represented by Robert Stolzberger,
Roxbury Defenders Comm.
Session was taped.

Mr. Fano was originally interviewed on 11-6-74. It was continued to 11-8-74 at attorneys request because Mr. Fano was not given 72 hours notice. Continuance granted. On Nov. 8, Mr. Stolzberger again requested continuance because a "witness", Mr. Quirk, CO was unavailable — on vacation to return on Nov. 11. Continuance granted until Monday Nov. 11, at 1 pm When Mr. Stolzberg entered hearing room with Mr. Fano, he again requested a continuance because Mr. Quirk wished to confer with his attorney as regards his presenting testimony. Further continuance was denied. Mr. Soares, member of committee called Mr. Quirk who reported that he did not wish to appear at the hearing. Hearing was openly with introduction of members of committee and prepared statement at

to purpose of Board. Both Mr. Fano and his attorney were advised that Mr. Meachum would be called to present informant information in closed session. Mr. Stolzberger offered a long statement regarding the use of informant information and continued as in all other cases in which he has served as attorney, to harangue regarding the use of intelligence, and again tried to change the focus of the hearing into a disciplinary one. The chairman, finally, requested that Mr. Stolzberger not try to turn the hearing into a D hearing or a judicial proceeding. He stated that he remained "under protest" His final demand was that Mr. Meachums statement he recorded. The request was denied.

Mr. Meachum presented the informant information (see statement attached)

Mr. Stolzberger then present one witness, Mr. William Leonard, Recreational Officer who offered a character reference for Mr. Fano. He stated that Mr. Fano has been an active, fine member of the inmate group working in athletics, always cooperative and helpful.

Mr. Jack Jackson, Unit Social Worker then presented the following information:

Brief History of Criminal Review:

Mr. Fano has an extensive criminal record, including 21 arrests. In 1954, he was committed for first time to Mass DOC (MCIC) In 1957, another committment in MCI Walpole. Charges have been Armed Robbery and Assault w/in to Rob/There have been several committments to H of C.

This committment:

5-4-71; Sent & Adm to MCI Walpole

A.	Manslaughter 18-20 yrs	
B.	Armed Robb(masked)	15-30 yrs CC
C.	Ass/D.W.	3-7 yrs CC
D.	Possess Burg Inst	3-7 CC
E.	B & E	3-5 yrs CC

1-31-73; Tr to MCIN (per order of Comm)
6-17-73; Escape from furlough
6-18-73; Returned from Furlough

General Adjustment:

Mr. Fano appears to have an alcohol problem and has had 2 D reports around booze. He has worked in kitchen, and now works as Number 1 houseman of Unit. He is active in sports, and maintains an avocation — leatherwork. He is also a member of Italo-American Club. He is not in counseling nor in a school program. Mr. Fano feels that he has a skill (cook/chief) and can follow that as a job once returned to street. He needs only to do his time.

The caseworker reports impressions from the house officers that: "Mr. Fano sometimes finds it difficult to control temper . . . is sometimes hard to deal with in that he changes schedules and does not do the job the way the house officer would like it done . . ."

Basis for decision:

1. The inclosed summary of informant information was considered. The sources are considered quite reliable in this case and tend to corroborate each other. In addition, the number of times the subject was named in conjuction with the unrest at Norfolk adds weight in the judgment of this board to the relability of this information.

2. The seriousness of his involvements were considered extreme. The danger posed by weapons and materials used for violence weighs very heavily against remaining in this population. In addition, the type of involvement of this man as an organizer, leader and inforcer was considered detrimental to the institution, and prohibitive to rehabilitative programming at MCI Norfolk at this time.

Respectfully Submitted
Selma K. Charif, Chairman
Dept Class. Review Board

Informant information excised

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-24-74 [ ] Refer to District Attorney
[x] Major [ ] Minor
Inmate's Name: Fano, Arthur
No. 21031 Report No. 74-364
Offense: Possession of Contraband
You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on 10/25/74 at 11 P.M. o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY
Disciplinary Officer

DETAILED ACCOUNT OF THE OFFENSE AND
SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

At approx. 6 P.M. on 24 Oct. in Unit 6-1 I decided to shake down Arthur Fano's room since he was removed from this unit this A.M. and placed in R.B.P.I. This shakedown could not be conducted this morning since subject had his locker keys on his person since this afternoon.

After checking with the officer in charge of 4-12 shift and informing him of my desires to shake Fano's room and securing such permission I proceeded.

Located in an upright footlocker and padlocked I found two one-gallon jars of homemade booze. Upon further search I found two slips of paper which appear to be betting slips which were well hidden under a stack of newspapers.

Reporting Officer's Signature: (s) PAUL D. HULL
Title C.O.

Course of action taken: ———

Officer's recommendation: Discretion of the Board
Supervising Officer's comment and review: ———
Notice delivered by: (s) DANIEL E. REILLY Date:10/25/74

RECORD OF DISCIPLINARY HEARING

Disciplinary Report No.: 74-364 Date: 10-25-74
Inmate's statement: Subject claims they are not betting chips but a football line (ILLEGIBLE). He does admit to possession of homemade booze.
Finding of Board: Guilty on possession of homemade booze.
Action taken by Board: 2 days Isolation

MEMBERS OF THE DISCIPLINARY BOARD

(s) (Illegible)	(s) (Illegible)	(s) (Illegible)
Administrative	Treatment/Social Services	Custodial

Disciplinary Officer

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-24-74 [ ] Refer to District Attorney
[x] Major [ ] Minor
Inmate's Name: Fano, Arthur
No. 21031 Report No. 74-363
Offense: Contraband, home made knife
You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on 10/25/74 at 11 P.M. o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY
Disciplinary Officer

DETAILED ACCOUNT OF THE OFFENSE AND
SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

On Oct. 24, 1974 in Unit 6-1 at around 4:30 P.M. I was searching Arthur Fano's room. Taped to his bed board which was under his mattress, was a homemade knife approx. 10 inches long.

Reporting Officer's Signature: (s) GEORGE R. PALMER
Title H.O.

Course of action taken: Notified OIC and Knife delivered to Copley, ADS

Officer's recommendation: Whatever the Board decides

Supervising Officer's comment and review: ———

Notice delivered by: (s) DANIEL E. REILLY Date:10/25/74

RECORD OF DISCSPLINARY HEARING

Disciplinary Report No.: 74-363 Date: 10-25-74

Inmate's statement:

(ILLEGIBLE)

Finding of Board: Not Guilty

Action taken by Board: Dismissal

MEMBERS OF THE DISCIPLINARY BOARD

(s) (Illegible)	(s) (Illegible)	(s) (Illegible)
Administrative	Treatment/Social Services	Custodial

Disciplinary Officer

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: 10-25-74

[x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Arthur Fano
No. N21031 Report No. 74-366

Offense: Using threatening or any other improper language toward any other inmate.
Passing or receiving contraband from other inmates.

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on ——— at ——— o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY
Disciplinary Officer

Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND
SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI Norfolk which posed a significant threat to person, property and security, it has been determined through a reliable source that Arthur Fano used threatening language toward other inmates, and that he possessed certain instruments that might be used as weapons, and further that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title Supt.

Course of action taken: ———

Officer's recommendation: ———

Supervising Officer's comment and review: ———

Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 12C

SUMMARY AND RECOMMENDATION
OF CLASSIFICATION PROCEEDING

Institution/Facility: MCI Norfolk Date: Nov. 13, 1974

[ ] Inter-Institutional

[ ] Community-Based
[x] Departmental Review Board
[ ] Other (specify) ———————

Resident's Name: Richard McPherson Number: N21608
PE: 9/16/77

Recommendation:
Placement: MCI Walpole
Conditions: None

Narrative: Mrs. Linda Olmstead, Attorney, Roxbury Defenders Comm. standing in for Attorney Alan Kaplan.
Hearing was taped.

The hearing was opened with a statement made by Mrs. Olmstead that "the hearing is illegal, based on an improven charge made by sources unavailable to client of attorney". Also stated "Therefore Mr. MacPhearson had been advised by Mr. Kaplan not to participate in the hearings".

The chairman advised Mr. MacPhearson that inasmuch as sufficient and proper notification had occurred, the hearing would be held, and that Mr. MacPherson might remain to listen and/or present any information which he wished. Mr. MacPhearson agreed to remain.

Introductions were then made and the prepared statement read. There being no further questions as to procedure thus far, Mr. MacPhearson and Mrs. Olmstead were excused, and Mr. Meachum entered to make his statement in closed session.

In addition to the prepared statement, Mr. Meachum reported that Mr. MacPhearson had been one of the men transferred following the July difficulties. Upon his return following a court hearing, he embarked on a angry vendetta, maintaining a reign of fear in the unit. (Statement enclosed)

When the hearing was resumed, Mr. Tom Connolly, Unit Social Worker presented the following information:

5-21-73 Sentenced and Admitted to MCI WALPOLE (first incarceration)
5-25-73 Transferred to MCI BRIDGEWATER STATE HOSPITAL (30 days observation)
7-17-73 Returned to MCI WALPOLE
1-30-74 Transferred to MCI NORFOLK
7-24-74 Transferred to MCI WALPOLE
9-26-74 Transferred to MCI NORFOLK

General Adjustment:

Mr. MacPhearson has consistently presented himself as a hostile, angry, young man and has a large number of D reports to prove it. These reports concern themselves primarily with disobedience, and disrespect.

Mr. MacPhearson has been a drug abuser for a long while, and prior to his commitment to MCI WALPOLE had been a patient at a VA hospital for drug abuse. Although he reports that he became a drug addict as a result of medication following 3 shrapnel wounds sustained in Vietnam, this information has not been corroborated. There is no evidence (in record) that he was wounded (he is not receiving disability) or that he was honorably discharged. (as he claims) Mr. MacPhearson told the committee (by accident) that while in the hospital, he had attacked the psychiatrist with a fork.

He has had no furloughs.

Informant information excised

Informant information excised

Basis for Recommendation:

1. Informant Information was judged sufficient in detail and reliability to be weighed seriously in the

boards decision making. The information regarding the subject's attitude and motivation seemed adequatedly supported by the man's record and his attitude before the board. (He stated he had never received fair treatment at classification). The reliability of the information was judged as quite reliable in that it came from three sources. When asked, Mr. Meachum provided details of the course of events on the night of Oct. 13th which substantiated in general terms the informant information presented (see attached letter)

2. The sources themselves were considered reliable, especially in cases of sources C and D. (see attached statement concerning reliability of sources).

(s) Selma K. Charif
Chairman

June 21, 1974

Incident Report

To: Deputy Superintendent
From: C. O. William M. Murphy
Ref: Inmate Richard McPherson

While sitting as Chairman of the Furlough Board this afternoon inmate Richard McPherson came before the Board for a quarterly furlough. He had had a recent lock-up and it was an easy decision to turn him down. When told of our decision he flew into a fit of temper, refused to sign to form, and stormed out of the room. This man is not the Norfolk type inmate. He is hot tempered, violent, and doesn't seem to show good reason.

(s) William M. Murphy
William M. Murphy

[*Two illegible pages dealing with McPherson Disciplinary Report*]

Massachusetts Correctional Institution Norfolk
Disciplinary Report

Date: May 4, 1974 [ ] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Richard McPherson
No. N-21608 Report No. 74-108

Offense: Out of Bounds; Failure to obey an Officer; Disrespect to an Officer.

You are hereby notified that you will be seen by the Disciplinary Board Officer at the next sitting to be held on May 6, 1974 at 3:00 P.M. o'clock concerning the following Disciplinary Report.

(s) J. E. Murphy
Disciplinary Officer

Detailed Account of the Offense and Surrounding Circumstances
(Attach supplementary sheet if necessary)

On Saturday, May 4, 1974, at 3:50 PM, Richard McPherson walked into Unit 2-1 with another inmate. McPherson was loud and he confronted Fisher Boyd, who is a black inmate, saying how he would like to "Club a Fucking Nigger". Boyd ignored him and walked upstairs. McPherson followed him up the stairs and had a few more words with him. I went up and told McPherson to get back downstairs. He did so and I went back to my office. McPherson then came to my office and asked if he could go upstairs and I said no. He then looked at the inmate accompanying him and said "Fuck him", and went upstairs anyway. I then went up for the second time and told McPherson to leave. He did leave, but only after inmate Robert O'Brien coaxed him into it. I then called the O. I. C. and had McPherson put in Unit A-A.

Reporting Officer's Signature: (s) Paul St. Laurent
Title D.O., Unit 2-1

Course of action taken: (ILLEGIBLE) Unit A-A
Officer's recommendation: Isolation time and have this man banned from Unit 2-d
Supervising Officer's comment and review: ————————
Notice delivered by: (s) Robert A. McCarthy Date: 5-5-74

RECORD OF DISCIPLINARY HEARING

Disciplinary Report No. 74-108 Date 5/11/74

Inmate's Statement:

McPherson (Illegible in record) bumped into each other and a heated exchange developed and he admitted to following Boyd upstairs to continue the argument (Illegible) admits to being out of bounds and disobeying the officer but was unaware of the remarks he made to both Boyd and the officer during the heat of argument.

Finding of Board: Guilty
Action taken by Board: 3 days isolation

Members of the Disciplinary Board

(s) (Illegible) Administrative
(s) (Illegible) Treatment/Social Services
(s) (Illegible) Custodial

———————————
Disciplinary Officer

5/10/74 Att. Kaplan acting as counsel

Massachusetts Correctional Institution, Norfolk
Classification Program Review Sheet

Date: 7-31-74

Name Richard J. McPherson Number N-21608
Unit Social Worker Santiago Leen

Chronology
??-21-73 (ED 5-17-73) Sent. & Com. MCI-W
Armed Rob. Masked 5-7, Armed Rob. 5-7 cc.
??-25-73 Trans. SSH - obs.
??-17-73 Ret. MCI-W
??-30-74 Trans. MCI-N
??-24-74 Trans. MCI-W.

Status: PE 9-16-76
1/3 1-16-75
COV. OFF.
Armed Rob.
Masked 5-7
WARR. None
S.D.P. N/A

Furlough Program None
Disciplinary Reports 2-15-74—Disturbance in quarters—warning. 5-4-74—out of bounds; failure to obey; disrespect—3 days isol.
Classification Program physical; constr. job; couns; music; education
Institutional Activities & Evaluation
(Program Changes)

Richard McPherson was born on December 8, 1949 in Medford, Mass. The eleventh ——— of 13 children (15 were born, but two died). His parents were apparently in their forties when he was born. He left school in the 9th grade, when he turned 16. His grades and conduct were poor, but he got along well with other students and he showed ability in music. In the ——— grade he received some individualized treatment and responded well, fixing appliances in ——— class.

From the time he left school until he joined the army in 1969, Mr. McPherson's work history is not on record.

From 1969 to 1971 Mr. McPherson served in the army in Vietnam. He returned with ——— decorations, shrapnel lodged in his head, and a heroin habit. For a couple of months he apparently worked in the Somerville Highway Department. In the fall of 1972 he sought help for his drug problem at the V.A. Clinic in Boston, and from Nov. 23,

1972 to February 5, 1973 he was a resident in the Bedford V.A. Hospital Drug Program.

Mr. McPherson's criminal record begins in 1968 with an assault and battery on a police officer (for which he paid a fine). Also in 1968 he was fined for driving under the influence of alcohol. In 1969 he was found guilty of being present where a narcotic drug was found (6 mo. H.C., 1 yr. prob.). In 1969, 70, and 72 he was arrested for drunkenness, and in 72 he was convicted of B&E but the sentence was filed.

Shortly after he entered MCI-Walpole Mr. McPherson was sent to Bridgewater State Hospital for observation, on admission they found him depressed, and paranoid. He was apparently withdrawing from drugs at the time. On discharge he was found to be detoxified and suffering from a personality pattern disturbance.

REVIEW DATE:
2 MARCH 74

IMPRESSIONS
Mr. McPherson spoke with apparent pride to a social worker in the past of his involvement in barroom fights. His present social worker has found him generally negative in outlook. The RDC evaluation points to the fact that Mr. McPherson seemed to do better when he feels he is being treated as an individual. It is evident that he has a serious drug problem, and he does not appear to have found the positive involvements that would help him to overcome it.

MASSACHUSETTS CORRECTIONAL INSTITUTION, NORFOLK
CLASSIFICATION PROGRAM REVIEW SHEET

Date: 8-6-74

NAME Richard J. McPherson NUMBER N-21608
UNIT SOCIAL WORKER Santiago Leen

CHRONOLOGY

STATUS: PE
1/3
COV. OFF.

WARR.
S.D.P.

SUPPLEMENTARY CLASSIFICATION PROGRAM

FURLOUGH PROGRAM
DICIPLINARY REPORTS
CLASSIFICATION PROGRAM
INSTITUTIONAL ACTIVITIES & EVALUATION
(Program Changes)

This report was written after the hearing and recommendation by the classification board August 2. It is based on an interview with Mr. McPherson at MCI–Walpole, the incident reports relied on in the decision of the classification board, and conversation with Mr. McPherson's senior house officer. Due to time pressures, it was impossible to incorporate these materials in the earlier classification review.

In substance the incident reports allege the following:

1. C.O. Edward Riendeau alleges that on an unspecified date during the disturbances, at about 9:45 PM, he observed Richard McPherson to be one of 25 to 35 inmates, most of them armed with bats or pipes, who ran from unit 7-3 to

unit 7-1 and engaged in heated discussion. He states that he specifically noticed that Mr. McPherson was carrying what appeared to be a bat.

2. C.O. William M. Murphy alleges that on June 21, 1974, (a date prior to the disturbances) he observed Richard McPherson fly into a fit of temper and stomp out of the room without signing the furlough form after being denied a furlough. He also makes negative observations of his general behavior.

3. C.O. R. Palmer alleges negative behavior by Mr. McPherson over several months, including suspected use of marihuana, and recites a specific incident (of unspecified date) [illegible] but apparently the same incident as described by C.O. Riendeau) in which Mr. McPherson allegedly led a group of inmates from 7-3 to 7-2 after curfew.

4. C.O. George Grigas alleges that on 7-21-74 in unit 7-3 he obesrved Mr. McPherson in an uncontrolled emotional state, and heard him say "They ought to kill the screws" and other statements aimed at no one in particular.

[illegible]
ing across the quad (lawn), improper dress, and "defiance to major counts". (He also makes a negative assessment of Mr. McPherson's general behavior.

In conversation with Mr. McPherson, he brought out the following information.

Mr. McPherson has had a problem with his temper as long as he can remember. Even when he was a small child he became extremely angry with his younger siblings. This predilection to become angry does not appear to be casually linked to intoxication or the use of drugs, nor does it seem to be strongly associated with assaultative behavior, nonetheless it is some indication of Mr. McPherson's persistent underlying negative feelings.

Mr. McPherson worked during the years 1965 to 1969 at Ames Color-file in Somerville (21 Properzi Way, 775-1142)

as a press operator. He left the job when he joined the marines, then returned to it after his service. He left to take a higher paying job doing road work for the city of Somerville.

Mr. McPherson is and has been since his school days deeply involved in music. He has played guitar and saxaphone in bands, and he also plays harmonica, flute and clarinet at performance level. He reads and writes music. At Norfolk, he has done most of his playing by himself, but has played in some groups.

Just prior to his enlistment in the Marines, Mr. McPherson was living with one of his brothers. They were involved together in fixing and racing motorcycles. Mr. McPherson joined the Marines shortly after this brother died. Mr. McPherson had another brother who is a career military man, which may have influenced his decision to enlist in the Marines. He also remembers having felt a desire to prove himself.

Mr. McPherson's drug habit developed in a way common among combat-wounded veterans: He was on morphine while in the hospital recovering; then the hospital staff put him on Demerol. After his discharge he switched to heroin.

When he realized he had a problem, Mr. McPherson went first to the Water Street V.A. clinic. As he described it, he was extremely troubled at the time. They referred him to the Jamaica Plain V.A. Hospital, but they did not feel able to handle him, so they sent him to a locked ward at the Bedford V.A. Hospital. He went from there to the center for attitude change at Boston State Hospital, but did not adjust well, and returned to Bedford. He went from there to court. Mr. McPherson feels he got a lot out of 1-1 counseling at Water St. and group therapy at Bedford. He got less out of the other programs.

Almost as soon as he arrived at Walpole, Mr. McPherson was transferred to the Bridgewater State Hospital for

observation. (See the Hospital reports in source folder). Mr. McPherson speaks with some feeling of the human waste he saw there.

While at Norfolk Mr. McPherson has been a full-time student most of the time. From January to June, he studied advanced English. In June he began courses in Mythology and Social Deviance (which he did not finish due to his removal from Norfolk). He attended AA about 70% of the time, and played on their softball team. He received few visits. He has a girlfriend, and has corresponded with her, but he asked her not to visit, as he did not want to go through the unhappiness caused by her departure. He has participated extensively in the sports program.

At Walpole, Mr. McPherson appears to have made an adequate adjustment to Block 10. He has been doing some playing, which he says drives his neighbors crazy, and he has a neighbor, a well-known informer, whose constant typing drives Mr. McPherson crazy. He says that when he wakes up each morning he can't quite believe he is in Walpole. Thanks to the intercession of Mr. McPherson's and the action of Supt. Waitkevich, Mr. McPherson's girlfriend has been placed on the visiting list.

In the future, Mr. McPherson would like to be a full-time professional musician.

July 23, 1974

To Mr. Meachum

At approx. 9:45 p.m. in Unit 7-3 I was waiting for inmates L. Sirocci, G. Racca, C. Dempsey, L. Hurney, to return from the Medfield Hosp. prison program.

I was standing on the inside of the front door in Unit 7-3 when I saw several officers leave the C.I.C. and walk towards Unit 7-1. Also inmate William Myers saw the same thing as I observed. At this point I step out of the

unit and observed a good size group of inmates standing in front of 7-1.

Several inmates left my unit and started towards Unit 7-1. One of these inmates was William Myers reached the group in front of Unit 7-1 and then started running back to Unit 7-3 shouting "There trying to get the 7-3 guys. He ran up the stairs in Unit 7-3 then 25 to 35 inmates came running out off Unit 7-3 most were armed with bats and pipes.

They all ran down to Unit 7-1 and there appeared to be some heated discussion from my vantage point. After a few moments they started to return to Unit 7-3.

Among those who I saw carrying weapons were Steven Doherty appeared to be carrying a 3 foot pipe. William Myers was armed with a 3 foot wooden stud. Richard McPherson was carrying what appeared to be a bat. Leo Hurney was making statements such as quote (Lets go back and get those guys again) Inmate Hurney appeared very [illegible] at this point and he also was carrying a wooden stud. They all return to the Unit 7-3 and I blew the whistle and called the C.I.C. that I was going to try and lock the inmates up for the 10 pm count.

There was no problem during the lock up and I called my count in 48 inmates and then lock the front door and started for the Gatehouse.

This entire incident lasted approx. 4-6 minutes.

(s) Edward Quinlan

EXHIBIT 12D

Of Classification Proceeding

Institution/Facility: MCI–Norfolk Date: 11/13/74

[ ] Inter-Institutional

[ ] Community-Based

[x] Departmental Review Board

Resident's Name: Richard De Brosky Number: N-19566
Age 30 PE 2/23/85
1/3 2/77

Recommendation:
Placement: MCI – B
Conditions: 90 day review—
School for GED: Counselling AA

Narrative: Mrs. Susan Thal, Law student with Roxbury Defenders Comm.
Hearing was not taped.

The hearing was opened with an introduction of Board members and the reading of a prepared statement as to the purpose of the Board. Ms. Thal asked "inasmuch as the charge that is stated in the notice of hearing reflects a disciplinary charge, how can the hearing take place?" Mr. Belcher, Board member replied that this Board is not interested in guilt or innocence, however, there will be informant informant presented by Mr. Meachum that will be evaluated, considered for reliability along other classification material presented. The Board Chairman further explained that both Mr. De Brosky and Ms. Thal may add any information that is relevant to a classification process. Ms. Thal and Mr. De Brosky were then excused and Mr. Meachum presented his informant information and a revue of the reliability of the sources in closed session. (Found in the final summary of this report.) Important to note that Mr. Meachum was questioned in great detail re: the specific information which the sources had supplied.

When Mr. De Brosky and Mrs. Thal returned, Ms. Briana Murphy, unit social worker presented the following information.

Brief review of criminal history

Subject has a history of (19) court appearances. First arrested at age 8 for breaking and entering (night). He

received a Youth Service Board suspended sentence and probation for 4 months filed. Subsequent arrests have included the following offenses:

Juvenile:
Larceny
Using without authority:

Adult:
Permitting operation of uninsured m/v
Permitting unreg. m/v to be operated
Illeg. attached plated
Drunk (8)
Dist. the peace
Oper. under influence
Rec. stolen property (2)
B&E (nt) w/int. Felony
Attempted breaking safe
Oper. after lic. susp.
Oper. w/o lic.
Using w/o auth.
Poss. burg. impl. (2)
Consp. B&E & L. (nt)
Larc. false pretence

Dispositions included the following commitments:
Youth Service Board and House of Correction (4)

2/24/70 Sentenced and admitted to MCI-Walpole

Charge:

a.	B&E nt & Larc.	3-5	Forthwith
b.	Put in fear for purpose of stealing	21-30	Fr. & aft. sent. being served.
c.	Armed Robbery (masked)	21-30	Conc. w/above
d.	Unarmed Robbery		
e.	A & B – D.W.	8-10	Conc. W/b

General adjustment

Richard De Brosky is serving a serious sentence, 24-35 yrs, It is his first state prison sentence and he appears to be taking it seriously. Although he is working hard to get his conviction overturned, Mr. DeBrosky is also building a record for his 1/3 consideration which will be coming up in 1977.

Mr. De Brosky's central activity was the paint crew. He had been a member of it during most of the time since he came to this institution and he had risen to a more or less supervisory level. His supervisor, John Magro, said he did a good job. For the past 2½ months, Mr. DeBrosky has worked as Visiting Room Host and Visitor's Photographer and goes to school remainder of tiem. School 8 A.M.-12 Noon. Visiting Room 12:30-3:30 6-8 PM He continued to work for GED.

In addition to his work assignment, Mr. DeBrosky ahe participated in a wide range of activities at Norfolk. For almost two years, he has been recording for the blind; he participated in Alcoholics Anonymous for about a year, and is presently enrolled in the counselling program which he has participated in regularly for about eighteen months.

Mr. DeBrosky is quite an athlete, being on the first teams in softball and football. He also has a moderately profitable woodwork avocation. Another important aspect of Mr. De Brosky's life seems to be his family ties. Although he was divorced from his wife in 1966, he retains strong interest in his son. His mother takes the bus from Haverhill to visit him once a month.

He has had no disciplinary reports and has completed 10 furloughs successfully.

When confronted during with facts of situation at MCI-N fires, contraband, weapons—he stated that he has worked too hard for 1/3 to jeopardize it now. He also claims no

close associations with other people in R.B.—or anyone else at MCI-N.

Attorney requested that if a transfer were indicated, to consider MCI,C

Mr. Meachum's Statement:

Source B—

1 Inmate identified materials and plans designed for use in an escape attempt. These involved the possible overthrow of the institution, Materials (ie: keys picks, homemade shotgun, and instructions for making a bomb) were found and an inmate was later charged and returned to Walpole.
2. He identified a major inmate drug dealer, which led us to find a large cache of drugs and over-supply of cigarettes. The inmate dealer is currecntly under idictment and has been returned to Walpole.
3. He informed us that inmate was receiving drugs in tape cassetted. We confiscated the tapes when they arrived in the mail, and found pills and heroin

Source D—

1. Other information has been validated by supporting information in regard to the current hearings.
2. He told us a unit had been prepared to be burned. We examined the rafters and found that they had recently been treated with a flammable compound. We prevented this fire.

Basis for Recommendation:

Summary of Informant Information and Conclusions:

Informant Information Excised

———

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK
DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Richard Dubrosky
No. 19566 Report No. 74-372

Offense: (10) Making or having in your Possession any type of dangerous weapon

You are hereby notified that you will be seen by the Disciplinary Board/Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY *A.D.S.*
Disciplinary Officer

Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES
(Attach supplementary sheet if necessary)

After a series of problems within MCI-Norfolk which posed a significant threat to person, property and security, it has been determined through a very reliable source that Richard Dubrosky Debrosky was in possession of instruments or materials that might be used as weapons and ammunition and further, that he had joined in plans to use these items of contraband.

Reporting Officer's Signature: (s) LARRY R. MEACHUM

Title: Supt.

Course of action taken: _____
Officer's Recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

EXHIBIT 12E

Institution/Facility: MCI Norfolk Date: Nov. 8, 1974
[ ] Inter-Institutional
[ ] Community-Based
[x] Departmental Review Board
[ ] Other (specify _____

Resident's Name: David Hathaway Number: N-21288
age: 33 PE 12-27-82

Recommendation:
Placement: MCI Bridgewater
Conditions: None

Narrative: Mr. Robert Stolzberger, Atty
Roxbury Defenders' Committee
Interview was taped

The order of the hearing was a general overview of the proceedings opening with an introduction of members of the committee and prepared statement as to the purpose of the hearing. Mr. Hathaway and his attorney were then advised that Mr. Larry Meachum, Supt. of MCI Norfolk would be called to present information in closed session. Mr. Stolzberger presented a formal objection to the presentation of such material, and also to the entire process of a review based on information that is not public or available to the attorney. The chairman noted Mr. Stolzberger's objection and again reminded the attorney that the hearing was neither a judicial nor an adversary proceeding. Mr. Stolzberger then stated for the benefit of the recording, that he was continuing "under protest" duly noted.

They were excused and Mr. Meachum entered to present his information and discussion as to reliability to sources (Presented elsewhere in this report) When presentation was finished he left.

Upon re-entering, the attorney again attempted to turn

hearing into D Board or judicial hearing and had to be stopped and reprimanded by the chairman. Throughout the hearing this occurred several times.

The unit Social Worker then presented the social and criminal history as presented below:

BRIEF REVIEW OF CRIMINAL HISTORY:

Extensive criminal history dating back to juvenile incarceration. First adult history in 1956 with N.C. sentences. First commitment to MCI Norfolk in 1964. All charges appear to be of violent nature (Armed Robbery, Assault D.W.) During 1970-71 when released he went to California, where again he became involved in illegal activities and spent time in prison there, San Quentin. When released on parole, he left the state to come to Mass.

11-28-72—Committed to MCI Walpole.

Charges: A—D Armed Robbery
16-25 yrs. (gov. sent.)
E—Armed Assault with intent to murder
15-20 yrs.

5-18-73; Transferred to MCI Norfolk
5-22-73; Transferred to MCI Walpole
8-21-73; Transferred to MCI Norfolk thru Classification Board
PE 12-27-82

GENERAL ADJUSTMENT:

Mr. Hathoway is current serving his second period of incarceration here at MCI:N. He was here between 1964 and 1967 when, at the beginning he had periods of despair and depression, culminating in an attempt to commit suicide which resulted in a period of 35 days observation at MCI:B. But that was many years ago. In 1967 he wrapped up his sentence, got married and had a daughter. In 1969 becoming disillusioned with married life, he left Mass. to travel to California where he eventually met up with his uncle

and they eventually got into further trouble and served time at San Quentin. He was paroled in 1971, but broke parole to return to Mass. to be near his girl friend and her mother.

The weight of the Ca. escape Warrant, plus associating with friends of dubious value, led Mr. Hathoway into present circumstances culminating in a dramatic shootout with the local police, hence his admittance to our hospital from the New Bedford jail for bullet wounds.

The reason for this background material is to tie together some of the operating factors in Mr. Hathoway's situation. He was an orphan and his adoptive parents were alcoholic and abusive. At fourteen, his father off-handedly told him he was not his real son, but was adopted which upset Mr. Hathoway greatly.

What is operating now is that at long last he feels that he has found as he puts it "the family I've never had" with his close attachment to his girl friend and her mother. Mr. Hathaway would like to someday marry her and she seems very willing to wait, according to Mr. Hathoway.

Here at MCI:N Mr. Hathoway is absolutely no problem as compared to prior street behavior. Currently, he is the Housman in his unit, has a laundry avocation, plays football and softball, and is the unit representative. He is interested in group therapy and has submitted his name to DLM.

During the interview Mr. Hathoway was very candid and honest. He is considered very reliable and trustworthy in the unit. He exhibits self insight and understanding into his reality situation and his feelings about it.

In sum, Mr. Hathoway appears to be sincere and honest and is doing his time in a constructive manner. He is dealing with the obvious contrast of his street behavior with his institutional behavior and is making progress.

No Disciplinary Reports.

Mr. Hathoway has had no furloughs approved. He had

had one furlough approved for August 74 but informant information indicated that he was planning to escape to Canada with girl friend. This information came to the Supt. from a source within the institution and another outside of the institution. Furlough was cancelled.

The unit Social Worker offered the observation "that Mr. Hathoway had been unit Rep and acted responsibly in many cases. However, he added, he does travel all over the camp with his Laundry Avocation and speaks to many people. Some believe (staff) that Hathoway is quiet into camp politics and could be more involved into things than what are on the surface."

Informant Information Excised

Basis for Decision:

1. When Mr. Hathoway was questioned during interview re: the charges expressed on notice of Classification hearing "serious fires occurring with MCI Norfolk . . . .", he immediately went into long discussion of two specific fires denying his quiet— Although he was not privy to informant information, and could not have known specifics that these were the two mentioned in the charges. The more he talked, the more he appeared involved.

2. The "reliable sources" were deemed acceptable as reliable because they had produced truthful information prior to incidents that were then avoided and serious harm prevented.

3. Mr. Hathoway, other than avocation has not made sufficiently of available programs at MCI Norfolk that might benefit him.

Decesion as Presented to Mr. Hathoway:

This committee feels that you should be removed from this environment and associates and the current situation

at MCI Norfolk. Because of this, the recommendation will be to MCI Bridgewater. There are programs, such as AA which will be available to you. There is also a new avocational center in which you can become active. It is a Medium Security institution, and this committee has tried to listen when you've said "Trust me"—Give me a chance . . ."

Mr. Stolzberger requested that his client be allowed to return to population to empty room and sell Avo equipment. Denied.

A counter suggestion was made that he work with Mr. Jackson, social worker to accomplish these ends. Mr. Hathoway accepted.

Respectfully Submitted,
(s) Selma K. Charif
Selma K. Charif MCIF
Chairman
Roy Belcher, DOC
Charles Soares, MCIB

Disciplinary Report

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor
Inmate's Name: David Hathaway
No. N-20664 Report No. 74-37
Offense: (1) Willfully disfiguring or damaging any part of the institution.
You are hereby notified that you will be seen by the Disciplinary Board/Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. Murphy *A.D.S.*
Disciplinary Officer
Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES

(Attach supplementary sheet if necessary)

After a series of serious fires within MCI Norfolk which caused considerable property damage and posed a very real threat to personal safety, it has been determined through reliable sources that David Hathaway has been significantly involved in the planning and execution of one or more of these fires.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title: Supt.

Course of action taken: _____
Officer's Recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. Ross Date: 10/25/74

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8 Nov 74

To: Whom it May Concern
From: Mr. Charles Ristaino, Plumber, Maintenance #2
Subject: David Hathaway

David Hathaway was employed by me as a Maintenance Plumber for several months. Although he no longer is so employed, I can say he is a stable, quiet inmate in all respects.

While employed in this shop, he was competent and dependable in all ways, and never had any problems associated with his work. David has gotten along well in the camp, and I would be happy to have him again employed here.

(s) CHARLES RISTAINO
Mr. Charles Ristaino
Plumber, Maintenance #2

EXHIBIT 12F

SUMMARY AND RECOMMENDATION OF CLASSIFICATION PROCEEDING

Date: Nov 6, 1974

Institution/Facility: MCI Norfolk
[ ] Inter-Institutional
[ ] Community-Based
[x] Departmental Review Board
[ ] Other (specify _____

Resident's Name: Charles Royce Number: 6 21546
age: 31 PE 1-21-79

Recommendation:
Placement: MCI:N (RB)
Conditions: 30 day review

That Commissioner recommend to Supt. Meachum to place Mr. Royce in RB in Administrative Segregation to be reviewed in 30 days. During this period.

1. Have Mr. Royce examined by psychiatrist with written report prepared for 30 day review.
2. Allow Mrs. P. Lowenstein, DLM, continued to see Mr. Royce in counseling session during period of segregation:
3. Instruct Jack Jackson, Unit Social Worker to confer with Mr. Royce on a regular basis in order to keep him to establish goals & plan for his own rehabilitation program, to be presented at 30 day review:

Narrative: Attorney Ms. Linda Olmstead,
Roxbury Defenders
Session was recorded on tape.

I. Reason for Referral:

Attached: Notice of Classification hearing and two additional D reports

II. Brief Summary of Criminal History:

Mr. Royce has extensive criminal history dating back to age 12. All cases were against property rather than person. He has also served sentences in California and there are two (2) outstanding warrants being held against him:

1. Parole Violation
2. Arrest for P.V.

III. Review of History in Dept. of Corr.

6-26-73; Sent & Admitted to MCI Walpole.
Charges: Armed Robbery 9-20 yrs
Unlawf. carring firearm 2½-3 yrs CC
9-14-73; To RDC
12-6-73; To MCIN

IV. General Adjustment:

Unit Social Worker, Jack Jackson, reported that he has done "all right" but appears to have mood swings. Recently had been depressed but appeared to be coming out of his depression. Mr. Royce has been in counseling for about one year with Mrs. Lowenstien and he feels that has been of great help. He saw the psychiatrist who noted that there are unresolved areas between his depression and elation and that he seems to be working on them with the therapist. He also recommended small dosages of Valuim. Mr. Jackson also stated that he believes that Mr. Royce is honestly trying to disengage himself from the political framework of prison life and the tenuous hold which his brothers, both incarcerated at MCIN, have on him. (Brothers; William, Thomas) Mr. Royce has been working in the Visiting Room as host. He has had 2 prior work placements but was fired from each.

(Mrs. Olmstead, attorney, asked permission to him Mr. Thomas Dresner, Supervising CO and Visiting Room Supervision, offer character reference for Mr. Royce. It was allowed and Mr. Dresner spoke highly of Mr. Royce's work, attitude nad interest)

Mr. Royce has attained his GED certificate, is active in poetry group and maintains a Woodworking avocation.

He has had no furloughs approved.

V. Basis for Recommendation:

1. Informant information was presented by Mr. Larry Meachum, Supt of MCI Norfolk, prior to the hearing. Although several sources contributed to the presenting information, the committee felt that the sources had not been proved reliable enough to become a decisive, factor indicating transfer. Both Mr. Meachums report & Source reliability report to follow elsewhere in this report.
2. Although Mr. Royce had an additional disciplinary report (see D reports 2-3) It was felt by the committee to be of serious emotional instability rather than resorting to earlier behavior of absolute violence.
3. Mr. Royce appears to be making an effort to get himself together with help. His good relationship with Mrs. Lowenstein and Mr. Jackson has been supportive of these efforts. His indicated interest in poetry, avocation, and school would also reaffirm his intent for self improvement.

Informant information excised.

DISCIPLINARY REPORT

Date: Oct. 25, 1974 [x] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Charles Royce
No. N-21546 Report No. 74-370

Offense: (16) Passing or Receiving Contraband from other inmates or visitors
(26) Possession of Narcotics, barbiturates and/or amphetamines

You are hereby notified that you will be seen by the Disciplinary Board/Officer at the next sitting to be held on _____ at ____ o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY *A.D.S.*
Disciplinary Officer

Case referred to Dist. Attorney for investigation

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES

(Attach supplementary sheet if necessary)

After a series of problems within MCI-Norfolk which posed a significant threat to person, property, and security, it has been determined through a very reliable source that Charles Royce was involved in the trafficing of Contraband in the institution.

Reporting Officer's Signature: (s) LARRY R. MEACHUM
Title: Supt.

Course of action taken: _____
Officer's Recommendation: _____
Supervising Officer's comment and review: _____
Notice delivered by: (s) GEORGE N. ROSS Date: 10/25/74

Pending as of 11-6-74

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK

DISCIPLINARY REPORT

Date: October 31, 1974 [ ] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Charles ROYCE
No. N-21546 Report No. 74-394

Offense: Disrespect to a Correction Officer

You are hereby notified that you will be seen by the Disciplinary Board/Officer at the next sitting to be held on 11/1/74 at 1:30 p.m. o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY *A.D.S.*
Disciplinary Officer

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES

(Attach supplementary sheet if necessary)

On October 31, 1974, at approximately 7:30 p.m., on the second floor of the Ad. Building. Inmate Charles ROYCE, while being escorted to the hospital for medical treatment (for NO apparent reason), called me a "MOTHER FUCKER". His exact words were, "YOU MOTHER FUCKER". This was said while he was looking directly at me.

Officer Hank LaVALLE who was escorting ROYCE, definitely heard this and will verify if necessary.

Reporting Officer's signature: (s) (Illegible) Title: SCO
Court of Action taken: This incident was reported to the OIC
Officer's recommendation: Reclassification
Supervising Officer's comment and review: _____
Notice delivered by: (s) C.O. PAUL ST. LAURENT
Date: 11-1-74

Pending as of 11-6-74

MASSACHUSETTS CORRECTIONAL INSTITUTION NORFOLK

DISCIPLINARY REPORT

Date: 10/31/74 [ ] Refer to District Attorney
[x] Major [ ] Minor

Inmate's Name: Royce, Charles
No. 21546 Report No. 74-393

Offense: Destroying State Property

You are hereby notified that you will be seen by the Disciplinary Board/Officer at the next sitting to be held on Nov. 1, 1974 at 1:30 p.m. o'clock concerning the following Disciplinary Report.

(s) J. E. MURPHY *A.D.S.*
Disciplinary Officer

DETAILED ACCOUNT OF THE OFFENSE AND SURROUNDING CIRCUMSTANCES

(Attach supplementary sheet if necessary)

At 6:45 pm in the Receiving Building on 10/31/74 Royce, Charles proceeded to break 14 windows out, the window in his door, and the toilet bowl.

The reason of this outburst was that he was informed that he was not receiving a visit as he had had eight (8) visits already this week.

In the course of breaking up his cell #20 on the 3rd floor of the Recieving Building Royce cut himself and was taken to the Hospital for treatment of lasceration of Left Thumb.

At 8:50 pm Royce was returned to Recieving Building.

Reporting Officer's signature (s) EDWIN F. CHRISTIANSEN
Title S.C.O.

Course of action taken: O.I.C., & G.H. & Hosp. Notified

Officer's recommendation: To be transferred to another institute as he is NOT Norfolk type of resident.

Supervising Officer's comment and review:_____

Notice delivered by: (s) C.O. PAUL ST. LAURENT
Date: 11-1-74

DEFENDANT'S EXHIBIT A

MASSACHUSETTS DEPARTMENT OF CORRECTION
Commissioner's Bulletin 72-1
Effective June 5, 1972

DISCIPLINARY POLICY

PURPOSE:

The disciplinary process is one of the most important elements of the correctional system because it affects the very lives, well-being, and attitudes of both residents and staff. These rules are promulgated in the belief that a speedy and fair adjudication of alleged wrong-doing coupled with meaningful sanctions contributes to the maintenance of security and the rehabilitation of the resident. This policy has been drafted after extensive consultation with the staff and residents at each Massachusetts Correctional Institution. Each superintendent will draft rules and regulations for the implementation of this policy. Once implemented the policy will be reviewed and may be revised at the end of a two month test period.

OVERALL SYSTEM:

These rules establish a hearing examiner system for minor violations where a trained impartial individual (designated as the disciplinary officer) investigates the circumstances, makes a finding of fact, and recommends a sanction(s) where appropriate within 24 hours of the alleged violation. If the finding is adverse to the resident, he will have the option of accepting the finding and sanction, or of

appealing the finding and/or sanction to a three man disciplinary board. Major violations will be certified to the disciplinary board for a formal hearing where the resident may have the benefit of representation, confrontation, and cross-examination. The action of the board may be appealed to the superintendent and certain sanctions may be appealed to the Commissioner of Correction.

The rules and regulations encompass both the following bold-faced type and the lower case narrative.

Approved by Alfred C. Holland
State Purchasing Agent,
Publication No. 6165

I. Appointments

A. THE DISCIPLINARY OFFICER FOR EACH INSTITUTION SHALL BE DESIGNATED BY THE SUPERINTENDENT.

The disciplinary officer is charged with a number of responsibilities including: fact investigation; recommendation of sanctions; consultation with the shift supervisor on the prehearing status of the resident; serving notice to resident and board; and general supervisory authority for the implementation of disciplinary rules. A disciplinary officer will be appointed for a three month renewable term and an alternate will be designated by the superintendent to serve during periods of absence. Interested persons are encouraged to suggest disciplinary officer candidates to the superintendent.

B. THE DISCIPLINARY BOARD WILL BE COMPRISED OF THREE MEMBERS DESIGNATED BY THE SUPERINTENDENT OR HIS DEPUTY.

Neither the disciplinary officer nor any person who witnessed the events shall sit on the disciplinary board. Board members need not be members of the institution's staff.

II. Reporting of Alleged Violations

A. EXCEPT FOR THOSE SITUATIONS WHERE ONLY SLIGHT SUMMARY PUNISHMENT SHOULD BE IMPOSED, ANY EMPLOYEE WHO OBSERVES OR HAS RECEIVED REPORT OF AN APPARENT VIOLATION BY A RESIDENT AFTER TAKING APPROPRIATE SECURITY MEASURES SHALL MAKE A SUFFICIENT INVESTIGATION SO THAT HE IS CERTAIN OF THE AVAILABLE FACTS. HE SHOULD IMMEDIATELY NOTIFY THE SHIFT SUPERVISOR AND COMPLETE A DISCIPLINARY REPORT.

These rules in no way preclude or discourage the present practice of the informal handling of very minor violations where an officer or supervisor issues a warning or otherwise disposes of the matter short of a formal sanction and disciplinary report.

B. THE SHIFT SUPERVISOR WILL REVIEW THE DISCIPLINARY REPORT FOR COMPLETENESS, ACCURACY, AND POSSIBLE MITIGATING CIRCUMSTANCES AND SUPPLEMENT THE REPORT WITH ANY PERTINENT DATA.

The supervisor has the authority to dismiss or revise a charge and/or handle the matter informally. He also makes the decision as to the resident's prehearing status pending consultation with the disciplinary officer.

C. THE DISCIPLINARY REPORT WILL THEN BE FORWARDED TO THE DISCIPLINARY OFFICER. A COPY OF THE REPORT SHALL BE FURNISHED TO THE RESIDENT.

The disciplinary officer has the responsibility of serving the resident with both a notice of charges and a copy of the disciplinary report as soon as practicable. Alleged violations will be investigated by the disciplinary officer unless he certifies the matter directly to the board for a formal hearing. Those matters certified directly to the board for a formal hearing are designated *major matters* while those retained by the disciplinary officer for his consideration are designated *minor matters.* Where the shift supervisor has placed the resident in pre-hearing detention, the disciplinary officer will consult with the shift supervisor concerning the resident's prehearing status.

III. Proceedings Before the Disciplinary Officer

A. Upon Receipt of the Disciplinary Report the Disciplinary Officer Will First Determine Whether To Certify the Matter to the Disciplinary Board For a Formal Hearing as a Major Matter. Where the Disciplinary Officer Designates the Case as a Minor Matter He Will Conduct an Independent Investigation and Make a Finding of Fact Which Shall Specify: Not Involved; Insufficient Facts To Justify Disciplinary Action; or Guilty of a Specific Violation or Violations. A Recommended Sanction Shall Accompany a Finding of Guilty.

In every case to be considered on the merits by the disciplinary officer he will interview the resident after first serving him with a notice of charges and a copy of the disciplinary report. Where the resident contests the allegations, the disciplinary officer shall interview the reporting officer and others witnessing

the events. The findings of fact will be based upon reliable evidence. Sanctions shall be recommended in light of both the offense and the offender.

B. The Findings and Recommended Sanction or Sanctions Shall Be in Writing and Presented to the Resident Who May Elect To Accept the Finding and/or Sanction, or May Appeal Either or Both to the Disciplinary Board.

The disciplinary officer or his representative shall normally present the finding and recommended sanction in person to the resident within 24 hours of the events, at which time he may discuss the events and options with the resident and shall advise the resident of his appellate remedy and supply him with the requisite form. In the special circumstances where the investigation cannot be completed within 24 hours of the events, the resident shall be so informed within the 24 hour period. Under no circumstances will a finding and sanction be presented after 72 hours from the events in question.

C. Where the Finding and/or Sanction Is Appealed the Disciplinary Officer Shall Forward the Disciplinary Report, the Findings, and Recommended Sanction to the Disciplinary Board Which Will Schedule a Hearing Within Five Days.

The resident shall be notified immediately of the scheduled date and time of the hearing and may request a short continuance for good cause.

D. Where the Case Is Certified to the Disciplinary Board as a Major Matter a Hearing Shall Be Scheduled Within Three Days.

Upon receipt of the disciplinary report the disciplinary officer must decide within 24 hours whether the case will be handled as a major matter. Once certified as a major matter the resident will be given notice of the charge and a copy of the disciplinary report. The disciplinary officer may consult the resident or any other person prior to certifying the case to the board for a formal hearing.

IV. Proceedings Before the Disciplinary Board

A. The Disciplinary Board Will Consider Both Major Violations and Those Minor Violations Appealed From the Disciplinary Officer.

In considering appeals on *minor matters* the board shall conduct a hearing at which the resident has the right to testify on the merits, present a statement in writing, and present any information in mitigation of punishment, though he shall not be compelled to testify. As to the findings on the merits, the board may: affirm the findings of the disciplinary officer, find the resident guilty of a lesser violation; or reverse the finding and dismiss the charge. As to the recommended sanction, the board has authority to affirm or reduce the sanction. The board's finding must be based upon reliable evidence and the resident may view any report considered by the board. No testimony may be presented outside the resident's presence unless he voluntarily absents himself.

In considering *major matters* the disciplinary board shall conduct a formal hearing where the resident may be represented by counsel of a law student. Where a resident is represented the institution may

also be represented by counsel or a law student. It is the resident's responsibility to secure the services of a representative and to this end he shall be permitted to make one telephone call to counsel or a law student group. If the resident desires the reporting officer's presence he must make this request at least one day prior to the hearing. It will be the responsibility of the disciplinary officer to schedule a hearing in accord with the officer's duty schedule. The board's finding must be based upon reliable evidence and the resident may view any report considered by the board. No testimony may be presented outside the resident's presence unless he voluntarily absents himself. The resident or his representative may question the reporting officer. The resident has the right to testify on the merits, present a statement in writing, and present any information in mitigation of punishment though the resident shall not be compelled to testify.

B. The Disciplinary Board's Findings Will Be Based Only Upon Reliable Evidence, and Matters External to the Case Will Not Be Considered.

The resident's past record is irrelevant to the consideration of the facts in question though it may be considered in deciding the appropriate sanction. The board's decision will be given to the resident within 48 hours after the hearing. The written statement containing the decision, findings of fact, and sanction will include a notice of the resident's right to appeal.

V. Appeal

A. Appeals From the Disciplinary Board on Minor Violations Will Be Considered by the Deputy Superintendent.

Where the deputy superintendent sat on the disciplinary board the superintendent will consider the appeal in the case of a minor violation. Routinely, a review of all disciplinary matters handled by the disciplinary officer, whether or not an appeal has been made, will be conducted by the Deputy Superintendent and he may take any action that he might have made in a case of an appeal.

B. Appeals on Major Violations Will Be Considered by the Superintendent and Cases Involving Recommended Good-time Forfeitures Will Be Reviewed by the Commissioner of Correction.

C. In No Event May a Person or Board Serving in an Appellate Capacity Increase Any Sanction or Charge.

VI. Resident's Status Pending Hearing

The Resident's Custody Prior to the Hearing Will Normally Remain Unchanged. He May Be Placed in Pre-hearing Detention Only Where He Is a Threat to Himself or Others.

In reviewing the disciplinary report the shift supervisor makes the initial determination on the resident's pre-hearing status. Where the resident is placed in detention the disciplinary officer, upon receipt of the disciplinary report, shall consult with the supervisor concerning the resident's pre-hearing status.

VII. Offenses and Sanctions

A. Major Matters Are Defined as Those For Which Punishment May Include: Isolation; Good-time Forfeiture; Transfer; or Any Sanction Authorized For Minor Violations.

B. Minor Matters Are Defined as Those Carrying Sanctions Which Are Limited to the Following: Warning and/or Probation; Loss of Certain Privileges For a Specified Time Period; Room Restrictions; Change of Housing Assignment Within the General Population; Restitution; and Change of Work Assignment and/or Extra Duty.

Each MCI may find it appropriate to modify or supplement the scope of minor sanctions but in no event may isolation, transfer, or good-time forfeiture, result from conviction of minor violations.

C. Punishable Offenses Are Limited to Those 28 Offenses Listed on the Disciplinary Reports Which Are Presently in Use by the Department. Determination of Whether an Alleged Violation Shall Be Handled as a Minor Matter or a Major Matter Will in All Cases Depend on the Nature and Extent of the Harm Done and the Threat to Institutional Security.

After the 60 day test period the list of punishable offenses will be modified. Many of the specified offenses can constitute either a major or minor matter depending upon the harm done. For example, a fight can be a very serious matter or a minor situation depending upon the nature of the harm done and the threat to the security of its institution. Also

theft can constitute a major or a minor situation depending upon the values of the property. Clearly cases involving little or no threat to the well-being of others and their property and security of the institution are intended to be handled as minor matters.

D. In Accordance With Present Practice and Law, Where the Superintendent Determines That a Felony Has Been Committed Within the Institution, He Shall Refer the Matter For Outside Prosecution Pursuant to Chapter 127, § 38C.

In no case where formal prosecution is pursued shall an alleged violation be the subject of an institutional sanction. The shift supervisor will make the initial decision as to pre-trial status. The superintendent upon the advice of the disciplinary officer and/or board shall make the final decision as to the resident's pre-trial status within 24 hours of the referral for formal prosecution.

The resident may request either the convening of a disciplinary board or an interview with the disciplinary officer for consideration of their recommendation to the superintendent. In every case either the disciplinary officer or the disciplinary board will make a pre-trial custody status recommendation. Upon the superintendent's request the board or disciplinary officer will also make a recommendation as to whether the case warrants outside prosecution. Where the disciplinary board considers either pre-trial custody status or the referral for prosecution, the hearing shall be conducted under the procedures governing major matters.

United States District Court
District of Massachusetts

Civil Action No. 74-5095-S

Fano Et Al

v.

Meachum Et Al

STIPULATION OF FACT

The parties hereby stipulate as follows:

1. During the period October 13, 1974 to October 31, 1974, there were a series of fires at Massachusetts Correctional Institution (MCI), Norfolk. The fire departments of the towns of Norfolk, Franklin, Wrentham and Walpole were sent into MCI Norfolk many times during this period. The statements from the fire departments of these towns attached hereto as Exhibits 1, 2, 3, 4 and 5 are authentic and the facts stated therein are accurate.
2. Since October 23, 1974 to date, there has been three fires at MCI Norfolk, one on October 25, 1974, one on October 31, 1974 and one on November 26, 1974. None of these fires was serious enough to require that any fire department forces be sent into MCI Norfolk.
3. The plaintiffs were removed from the general population at MCI Norfolk on October 24, 1974 with the exception of plaintiff McPherson who was removed from general population on October 16, 1974.
4. The letter from Commissioner Frank A. Hall (attached hereto as Exhibit 6) and the lists of incidents of fires at MCI Norfolk prepared by John Murphy, Assistant Deputy Superintendent of MCI Norfolk attached hereto as Exhibit 7 are authentic. The parties do not stipulate to the accuracy of the statements contained therein.

Counsel for Plaintiffs:

_____

Date:

Counsel for Defendants:

_____

Date:

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

December 10, 1974

Mr. David M. Marchand, Secretary
Executive Office of Administration and Finance
State House
Boston, MA 02133

Dear Secretary Marchand:

As you perhaps know, MCI-Norfolk was plagued by a series of inmate-caused fires during the period October 13 – October 31, 1974 which caused damage estimated to be in excess of $100,000 and the loss of two living units and the partial loss of the laundry. Attached is a report submitted by the institution which chronicles these fires—both major and minor—during this period. While critical, this situation never developed into the type of "emergency" that has occurred in the past and could occur at some future time. It nonetheless required the utilization of a substantial amount of the Department's resources.

In order to prevent the fires, to the extent possible, and to minimize the damage caused by those that could not be prevented, I deemed it necessary to increase the number of officers at MCI-Norfolk to man extra patrols on each shift. In total, approximately 250 hours of overtime were necessary during this 21 day period, resulting an in expenditure of $24,713.93. In addition, to ensure that manpower would have been available immediately in the event that this fire setting developed into a still more serious situation, I felt it necessary to hold 25 officers assigned to MCI-Walpole for 4 hours beyond their normal eight hour shift on

October 16, October 21 and October 23, 1974. This 300 man-hours of overtime resulted in an expenditure of $8,055.

The Fiscal Year 1975 Budget (Chapter 431 of the Acts of 1974) allocates $78,000 for overtime for both custodial and non-custodial personnel at MCI-Norfolk. During Fiscal Year 1974, a shortage of security staff required approximately $265,000 in correction officer overtime, most of which had to be funded through a deficiency budget. The FY 1975 budget addresses this problem by authorizing the establishment of 19 new custodial positions at MCI-Norfolk.

It is nonetheless apparent that there will not be sufficient funds in the 02 subsidiary to meet overtime requirements, given the recent large expenditure, at either MCI-Norfolk or MCI-Walpole. I also feel that there have been no reasonable options open to stop the overtime. As Commissioner of Correction, I am also responsible for the safety of Department personnel, inmates and the general public and these responsibilities must have a high priority.

Perhaps the most expedient action for me to take is to do what has been done too often in the past: ask the officers to continue to work overtime even after the funds available have been exhausted and ask the Governor and the Legislature sometime next spring to authorize funds to meet this large unpaid bill. There are several reasons why I prefer not to do this. First, I respect the Legislature's authority to appropriate funds and I do not want to presume to infringe on this prerogative by spending more funds than are appropriated to the Department. Rather, I consider part of my responsibility as Commissioner to closely monitor the Department's rate of expenditure and in the event that it appears that expenditures are likely to exceed appro-

priations to take immediate action to control these expenditures, or, if they are not subject to my control, to promptly notify the appropriate authorities in the Executive branch and in the Legislature of the need for additional funds.

Moreover, I feel it is grossly unfair to the personnel at MCI-Norfolk to require them to work the overtime and not be paid promptly. They are providing an important, necessary and hazardous service and should not be penalized for fulfilling their responsibilities.

In order to pay this overtime promptly, I am therefore requesting a transfer of $24,713.93 from the unforseen emergency reserve (Item 1599-2025, Chapter 431 of the Acts of 1974) to the 02 subsidiary of MCI-Norfolk's appropriation account (4316-0001) and a transfer of $8,055 from the unforeseen emergency reserve to the 02 subsidiary of MCI-Walpole's appropriation account (4313-0001). I certify than an unforeseen emergency existed at the time this overtime was incurred.

In addition to utilizing its own resources, the Department was compelled to seek the assistance of the fire departments of the towns of Franklin, Norfolk, Wrentham and Walpole to extinguish the numerous fires that occurred. Under difficult and hazardous circumstances, these Departments performed admirably and effectively. Attached is an accounting of the costs incurred by each of these Departments in extinguishing fires at MCI-Norfolk during the period October 12 – October 31. These costs totalled $5,405.79.

In this instance, as well, the Department simply does not have the means to reimburse these towns for their services during the emergency situation. I respectfully recommend

that funds be transferred from the unforseen emergency reserve to reimburse these towns for the expenses incurred by their fire departments in extinguishing the fires at MCI-Norfolk during the period October 13 - 31, 1974.

I would appreciate your prompt consideration and approval of this request. Thank you again for your assistance.

Sincerely,
(s) FRANK A. HALL
FRANK A. HALL
Commissioner

FAH :BJR :cf
cc: Peter C. Goldmark, Jr., Secretary

Oct. 13, 1974 Approximately 1:30 A.M. Fire reported in attic Unit 7-3 Extensive damage to attic. [Illegible] 9 inmates relocated.

Oct. 16, 1974 7:00 P.M. Fire reported in attic Unit 7-3. Fire again reported, [Illegible] 10:30 P.M. All inmates relocated in other units [Illegible]

Oct. 17, 1974 8:45 P.M. Fire reported in attic. [Illegible]

Oct. 18, 1974 9:00 A.M. Fire reported in cell of Unit 1-2. Extensive damage. [Illegible]

Oct. [Illegible]

Oct. 21, 1974 1 A.M.—Minor fire—desk top in room of John Taylor, Unit 1-3.

Oct. 21, 1974—12:15 A.M. Fire reported in cellar of Unit 1-2—Out at 2:00 A.M.
12:30 A.M.—Trash barrel fire Unit 1-3—2nd floor.

Oct. 21, 1974 4:02 P.M. Fire reported in Institution Laundry. Extensive damage to back room

(sorting room) bins and marking equipment.
12:00 Noon. Fire discovered in rag bin—Iad. Bldg. Stock room.
3:55 P.M.—Attempt to set fire to desk outside C.S.D. Office.

Oct. 22, 1974. Damage was discovered in Room 2-15 — School Bldg.—Curtains and window shades showed fire damage. Date or times of fire unknown.

Oct. 22, 1974. Waste basket fire in Hospital.
A.M.

Oct. 23, 1974. 9:15 P.M. — Fire in attic of Unit 3-2. Firemen from Norfolk, Wrentham, and Walpole in. Considerable damage to roof. All inmates removed to R.B. — Fire trucks out at 12:00 mid.

Oct. 25, 1974. 10:15 A.M. — Fire reported in Spanish Class room 207 — School Bldg. Damage to books, book cases and wall. (Put out with extinguisher).

Oct. 31, 1974. Approximately 12:00 Noon. — Fire in rubbish barrel, Unit 6-1 cellar. NO damage.

BOARD OF SELECTMEN
Norfolk, Massachusetts

November 14, 1974

Commissioner Frank Hall
Massachusetts Correctional Institution Norfolk
Main Street
Norfolk, Mass.

Dear Commissioner Hall,

Enclosed please find [illegible] recent prison fires at MCI Norfolk
Included, besides Norfolk, is a list for each surrounding town that assisted during these fires.

We hope that this information is of some help to you.

Very truly yours,

BOARD OF SELECTMEN, TOWN OF NORFOLK

(s) ROBERT K. FORSBERG
ROBERT K. FORSBERG, Chairman
RKF/mp
Enclosures

[Letterhead — TOWN OF NORFOLK, FIRE DEPARTMENT]

November 4, 1974

FIRES AT MCI, NORFOLK
8/31/74 - 10/23/74
[First two dates and data illegible]

10/13	1:31 am	8 men	2 hrs.	68.80
10/16	7:08 pm	15 men	2 hrs.	120.00
10/16	10:00 pm	13 men	5 hrs.	168.00
10/17	8:50 pm	13 men	2 hrs.	103.50
10/21	12:23 am	10 men	3 hrs.	129.75
10/21	4:08 pm	13 men	2 hrs.	112.00
10/23	9:20 pm	12 men	5 hrs.	253.75
			TOTAL	$1153.00
				—182.50
				970.50

Chief ..... $5.00 per hr.
Firemen ..... 4.25 per hr.

CHIEF JAMES H. CRIBBY
[Letterhead — FRANKLIN FIRE DEPT., Franklin, Mass.]

November 4, 1974

COST OF RESPONSE OF THE FRANKLIN FIRE DEPARTMENT
FRANKLIN, MASS. TO MCI, NORFOLK, 10/16/74 - 10/23/74

10/16	7:17 PM	5 men	2 hours	@$5.99	$859.90
10/16	7:17 PM	8 men	2 hours	4.99	79.84
10/16	11:00 PM	4 men	2 hours	5.99	47.92
10/16	11:00 PM	11 men	1 hour	4.99	54.99
		[ILLEGIBLE]			
10/21	4:08 PM	7 men	1 hour	5.99	41.93
10/21	4:08 PM	3 men	2 hours	5.99	35.94
10/21	4:08 PM	7 men	2 hours	4.99	59.85
10/23	9:20 PM	5 men	3 hours	5.99	89.85
10/23	9:20 PM	1 man	2 hours	4.99	9.98
10/23	9:20 PM	10 men	3 hours	4.99	149.70
				TOTAL	$922.39

(s) PAUL H. BEAUDETTE
PAUL H. BEAUDETTE, Chief

TOWN OF WRENTHAM, FIRE DEPARTMENT

October 21, 1974
(4:29 p.m. - 6:00 p.m.)
Engine 1 = $50.00 plus payroll of $135.26 for total of $185.26.

October 25, 1974
(9:20 p.m. - 12:20 a.m.)
Engine 1 —$50.00 Engine-Rescue 7 — $50.00
Plus payroll of $420.90 for total of $520.90

TOTAL COSTS = $706.16.

[Letterhead — TOWN OF WALPOLE]

October 24, 1974

COST OF RESPONSE BY THE WALPOLE FIRE DEPARTMENT,
WALPOLE, MASS. TO MCI, NORFOLK 8/31/74 - 10/23/74

8/31	3:02 pm	18 men	1 hr.	$100.44
9/12	5:42 pm	28 men	2 hrs.	286.44
10/13	1:35 am	21 men	2 hrs.	214.83
10/16	7:10 pm	27 men	2 hrs.	276.21
10/16	10:15 pm	28 men	3 hrs.	416.64
10/17	8:48 pm	30 men	2 hrs.	306.90
10/21	12:31 am	29 men	3 hrs.	431.52
10/21	4:10 pm	36 men	3 hrs.	535.68
10/23	9:22 pm	32 men	4 hrs.	624.96
			TOTAL	$3,193.62
				386.88
				2,806.74

1st hour ..... rate, 5.58
2 or more hours ..... rate, 4.65

(s) ROBERT M. GARDNER
ROBERT M. GARDNER, Chief

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

ANSWER OF DEFENDANT MEACHUM

Now comes Defendant Meachum in the above-entitled matter and, by his attorney, makes the following answers to the amended complaint filed herein stating:

1. That paragraphs 1, 7 and 8 of said complaint do not contain factual allegations which admit of a responsive pleading;

2. That Defendant Meachum denies paragraph 2, 9, 10, 17, 19d, 19h, 25, 27, 33 and 35 through 46, inclusive, of said complaint and calls upon plaintiffs to prove same;

3. That said Defendant Meachum admits paragraph 3-6, inclusive, 12-15, inclusive, 18, 20, 22, 23, 24, 26, 30 and 34 of said complaint;

4. With regard to paragraph 11, that Defendant Meachum denies that McPherson was not told why he was placed in segregation and denies that he (McPherson) received no notice (inasmuch as oral notice was given), but admits all other factual allegations contained within said paragraph of the complaint;

5. With regard to paragraph 16, Defendant Meachum admits the factual allegations contained in said paragraph,

except that he denies all of those factual allegations contained within the last sentence of said paragraph;

6. With regard to paragraph 16, Defendant Meachum denies that "being placed in segregation at M.C.I., Norfolk inflicts a grievous loss on the plaintiffs and is, therefore, the constitutional equivalent of punishment," but admits all other factual allegations contained within said paragraph of the complaint;

7. With regard to paragraph 21, Defendant Meachum admits all factual allegations contained in said paragraph admits all factual allegations contained in said paragraph, except those found in the last sentence of said paragraph which he denies;

8. That Defendant Meachum admits all factual allegations contained within paragraph 29, except that he denies those allegations contained within sub-paragraph C thereunder;

9. With regard to paragraph 31, Defendant Meachum admits all factual allegations contained therein, except that he denies that plaintiffs were "not informed of its contents;"

10. With regard to paragraph 32, Defendant Meachum denies that Defendants Hall and Dawber "did not make an independent investigation" and "relied wholly upon the record made in the Classification Board hearing" and that they based their decision solely upon the information presented therein;"

11. And further answering, Defendant Meachum states that the remaining paragraphs of said complaint do not contain factual allegations which admit of a responsive pleading.

Respectfully submitted,
ROBERT H. QUINN
Attorney General
BY: (s) WILLIAM T. HARROD III
WILLIAM T. HARROD III
Deputy Assistant Attorney General

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS

CIV. A. No. 74-5059-S.
ARTHUR FANO et al.,
Plaintiffs,
v.
LARRY MEACHUM et al.,
Defendants.

Robert Stolzberg, Linda Olmstead, Roxbury Defenders Committee, Roxbury, Mass., for plaintiffs.

Michael C. Donahue, William T. Harrod III, Asst. Attys. Gen., Robert H. Quinn, Atty. Gen., Boston, Mass., for defendants.

OPINION AND ORDER
Jan 10, 1975

SKINNER, District Judge.

This petition is brought under the Civil Rights Act, 42 U.S.C., Section 1983, for declaratory, injunctive, and compensatory relief by 17 inmates of the Massachusetts Correctional Institution, Norfolk, a medium security state prison operated by the Massachusetts Department of Correction. They allege, in substance, that they have been reclassified into substantially more adverse conditions of confinement because of specific prior conduct without the due process required by the Fourteenth Amendment to the Constitution of the United States.

The complaint was filed on November 4, 1974. The plaintiff's motion for a temporary restraining order was denied without hearing on the same day.

On December 12, 1974, six of the plaintiffs, namely Arthur

Fano, Richard DeBrosky, Robert Dussault, David Hathaway, Richard McPherson and Charles Royce filed an Amendment Verified Complaint on behalf of themselves and "all others similarly situated." There has been no showing which would justify the certification of this action as a class action and the Amended Verified Complaint, therefore, will be considered only with reference to the six named plaintiffs who have filed it. The same six plaintiffs (hereinafter referred to as the plaintiffs) have filed a motion for a preliminary injunction on which a hearing was held on December 20, 1974. The matter was presented on stipulations of fact, stipulated documents, and the testimony of the plaintiff Hathaway. There does not appear to be any material issue of fact.

FINDINGS OF FACT

In the fall of 1974, there was a period of unrest among the inmates of M.C.I., Norfolk. From August 13, 1974 through October 23, 1974, there were nine fires in the institution, thought to have been set, which were serious enough to require the presence of outside fire departments. In addition, there were three less serious fires, one on October 25, 1974, one on October 31, 1974, and one on November 26, 1974.

Plaintiff McPherson was taken from the general population at M.C.I., Norfolk, on or about October 16, 1974, and placed in a cell in the Receiving Building at the institution (hereinafter referred to as the RB). On October 24, the plaintiffs Fano, DeBrosky, Dussault, Hathaway and Royce were taken from the general population and placed in cells in the RB.

The RB at M.C.I., Norfolk, is apparently principally used for the processing of new inmates. In effect, it also serves as an informal Departmental Segregation Unit, though it apparently has not been officially designated as such. The conditions of confinement in the RB are roughly comparable to those in the Departmental Segregation Unit, Cell Block 10, at M.C.I., Walpole described in the Revised Opinion and Order in

Daigle et al. v. Hall et al., CA 74-4783-S, filed January 7, 1975. No notice or hearing was afforded the plaintiffs before their transfer to the RB.

On October 25, 1974, the defendant Meachum filed and presented each plaintiff with a copy of a disciplinary report. The offenses charged against each plaintiff were described in substantially the same terms as appears in the notices of reclassification hearings hereinafter quoted. In each case the offense charged was referred to the local District Attorney for investigation and outside prosecution. Consequently, in accordance with paragraph VII D of Commissioner's Bulletin 72-1, no disciplinary hearing was held.

On November 4, 1974, each of the six plaintiffs received a Notice of Classification Hearing. With reference to the plaintiffs Fano, DeBrosky, and Dussault, the reason for review of the classification status was set forth as follows:

> "The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.
>
> "These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage."

With respect to the plaintiffs Hathaway and McPherson, the reason for review of the classification status was stated as follows:

> "The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring with MCI Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

With respect to plaintiff Royce, the reason for review of the classification status was as follows:

> "The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk, (narcotics, barbiturates and/or amphetamines.) This occurred during a period of serious unrest at MCI Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI Norfolk as well as serious property damage."

On November 6, 8, 11 and 13, classification hearings were held with respect to each of the six plaintiffs. Each plaintiff was represented by counsel. The evidence with respect to the alleged offenses committed by the plaintiffs, however, was given in closed session outside of the presence of the plaintiffs and their counsel and was apparently, in each case, in the form of recitation by the defendant Meachum of information purportedly furnished to him by a confidential informant. The nature of this information has never been made known to the plaintiffs or to their counsel even in summary form. They have not been informed of even so much as the dates and places of the alleged offenses.

The classification board made a recommendation for a transfer to either Walpole or Bridgewater in the case of each plaintiff except Royce, who was to be held in administrative segregation for thirty days and given a second classification hearing at the end of thirty days.Each plaintiff appealed this classification recommendation to the defendant Hall. The defendant Hall denied the appeals, but modified the recommendations of the classification committee and entered orders transferring all of the plaintiffs, including Royce, to MCI, Walpole, except Hathaway, who was ordered to be transferred to MCI, Bridgewater. At the time of the hearing all of these transfers had been accomplished except that of the plaintiff LeBrosky, who was in the hospital at MCI, Norfolk, and Hathaway, who was retained in the RB at MCI, Norfolk.

[1] I find that the conditions of confinement at MCI, Walpole and MCI, Bridgewater, are substantially more adverse than they are at MCI, Norfolk. I further take judicial notice that these institutions have been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction.

RULINGS

This state of facts raises once again the issue of the subjection of prison inmates to what are essentially disciplinary procedures without the elements of due process required under the rule of Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2968, 41 L.Ed. 2d 935 (1974). As in Daigle v. Hall, *supra*, a hearing before a disciplinary board was bypassed because the alleged offenses had been referred to the local District Attorney for investigation and prosecution. The applicable rules of law were extensively discussed by this court in the Revised Opinion and Order in Daigle v. Hall filed January 7, 1975, and need not be repeated here.

The defendants assert, however, that the cases of these plaintiffs do not fall within the general rule and that they have received all of the due process to which they are entitled, because the information concerning their alleged offenses was derived from confidential informants. The defendants claim that they are not obliged even to provide a summary of the information derived from the confidential informant, or even so much as the dates and places of the alleged offenses, because to do so would compromise the confidential informants. They further assert that the policy which they have followed in these cases is necessary to safeguard the lives of the confidential informants, to preserve the flow of information to the administration and to maintain the safety and good order of the institution.

The defendants apparently feel that they are unable, at the medium security institution at Norfolk, to follow the minimum requirements established for such situations at the maximum security prison at MCI, Walpole.

[2] Institution Order 4310.1,* which is applicable to disciplinary hearings at Walpole, contains in Section 11.4 h) the following provisions:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve:
>
> (1) Subjecting the informant to a risk of harm or
>
> (2) A substantial risk to institutional security
>
> (3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record
>
> (4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

[3] It is absolutely basic to any concept of due process that a person charged be given sufficient information concerning the charge against him so that he may intelligently prepare a defense. The above quoted Section 11.4h) sets forth the constitutional minimum. The defendants thus have three constitutionally acceptable choices:

1. To follow a procedure substantially in accordance with the above quoted Section 11.4h);
2. To develop independent evidence which would obviate the need for the confidential informant's testimony; or
3. To forego disciplinary action if the interest in preserving the secrecy of confidential information is deemed paramount.

[4] It is clear that the procedure followed by the defendants with respect to these plaintiffs does not meet constitutional requirements of due process, and their actions with respect to these plaintiffs cannot be allowed to stand. The notice of the hearing, furthermore, must at the very least state the time and place of the alleged offense with reasonable accuracy.

*This Order was not introduced in evidence in this case, but in Daigle v. Hall, *supra*. The defendant Hall, at least, is charged with knowledge of it, and the Court takes judicial notice of it for purposes of this case.

[5] Since uniformity is an aspect of due process in a correctional institution, the matters herein referred to should be the subject of departmental regulation. Most of these matters are covered by the order in Daigle v. Hall, *supra*. There is no evidence of any order in force at MCI Norfolk comparable to Institution Order 4310.1. Some regulation conforming in substance to Section 11.4h) of that order must be promulgated. Whether it should be promulgated as a departmental order or left to the superintendents of the various institutions to produce approximate versions of it, is up to the defendants. Although Institution Order 4310.1 provides disciplinary hearing rules which exceed the minimum requirements of Wolff v. McDonnell, *supra*, there should be reasonable uniformity within the department; inmates at Norfolk are entitled to at least the level of due process afforded their brethren at Walpole.

[6] In accordance with the foregoing, I hereby enter the following Preliminary Order.

PRELIMINARY ORDER

It is ordered, adjudged and decreed as follows:

1. The defendants are ordered to return the plaintiffs to the general population at MCI Norfolk forthwith, and not transfer them to conditions of confinements substantially more adverse than the conditions of confinement at MCI Norfolk by reason of their specific prior conduct, until they have been afforded a hearing substantially in accordance with the requirements of a disciplinary hearing as set forth in Commissioner's Bulletin 72-1 and Institution Order 4310.1; notwithstanding the fact that much specific prior conduct may have been referred to an

outside law enforcement agency for investigation or prosecution.

2. The defendants Hall and Meachum, or either of them, are ordered to submit to the court for approval regulations governing the inmates at MCI Norfolk which will provide them with rights to hearings substantially in accordance with Institution Order 4310.1 and the orders of the court entered in Daigle v. Hall, *supra*.
3. Nothing herein contained shall prevent the defendant Meachum from placing the plaintiffs, or any other inmate, in the Receiving Building for a short period on an emergency basis if in his considered opinion, the safety of inmates or the good order of the institution require it; provided that in every case an appropriate hearing be afforded the inmate as promptly as possible.
4. This case shall stand for further hearings on the claims of the other eleven plaintiffs and for hearings on the claims of all plaintiffs for damages.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIV. A. No. 74-5059-S.
ARTHUR FANO et al.,
Plaintiffs,
v.
LARRY MEACHUM et al.,
Defendants.

STATEMENT OF REASONS FOR DENYING STAY
January 17, 1975

SKINNER, D.J.

1. The defendants have deliberately (and properly) differentiated the various institutions within the department with respect to severity of confinement. Transfer to MCI Norfolk from MCI Walpole is considered a reward for good behavior, and transfer from MCI Norfolk to MCI Walpole or MCI Bridgewater is punishment.

2. The plaintiffs are presently under such punishment without having had any hearing worthy of the same. The burden on the defendants to comply with the order can not be regarded as unreasonable since the required procedure is presently in force at MCI Walpole, the maximum security prison. No explanation has been offered as to why the application of this rule would be more disruptive at MCI Norfolk than at MCI Walpole. The "hearings" allegedly given the plaintiffs provided no information as to the charges against which the plaintiffs were required to defend themselves.

(s) Walter Jay Skinner
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

AFFIDAVIT OF LARRY MEACHUM

I, Larry Meachum, being duly sworn, hereby depose and say:

1. I am the Superintendent of the Massachusetts Correctional Institution, Norfolk.

2. During the month of October, 1974 there was a period of serious disruption at M.C.I., Norfolk during which numerous fires were set in the institution. Some of these fires caused severe damage to the institution. Bed space for 100 inmates was rendered unusable by the fires.

3. Based upon information from reliable inmate informant sources which was relayed to me by members of my staff, I concluded that Plaintiffs were among the inmates responsible for the disruption in the institution. Specifically, informant information linked Plaintiffs Hathaway and McPherson to the setting of fires in the institution, Plaintiff Royce to trafficking in contraband (narcotics, barbiturates, and amphetamines), and Plaintiffs Dussault, Fano, and DeBrosky to the possession of weapons.

4. Based upon this information, Plaintiffs and other inmates were removed from the population at M.C.I., Norfolk to an area of separate confinement at the institution. Plaintiffs were then given notices of classification hearings, copies of which were filed with the Court with a Stipulation of the parties on December 20, 1974.

5. Plaintiffs were then afforded classification hearings at which they could be represented by counsel. I am informed that at the beginning of each hearing, the Plaintiff who was the subject of the hearing was informed that there was informant information to be presented to the board and that this would be done without the inmate or his counsel being present and that the inmate and his counsel were then asked to leave the room. I then presented to the board the informant information which I had received along with a record of prior instances of each informant's information having proved reliable.

6. In my opinion, giving Plaintiffs a more detailed description of the activities they were alleged to have been involved in would have created a substantial risk of revealing the identity of the informants, thereby placing their lives in danger.

7. Following these hearings and final decision by the Commissioner of Correction, the Plaintiffs were removed from M.C.I., Norfolk to M.C.I., Walpole with the exception of Plaintiff Hathaway who was removed to M.C.I., Bridgewater.

8. Except for a few minor instances, the fires at M.C.I., Norfolk stopped after the Plaintiffs and other inmates were removed from the institution.

9. Since the Plaintiffs and other inmates were removed from M.C.I., Norfolk, I and members of my staff have received information from inmates other than the original informants to the effect that the administration had removed from the population of M.C.I., Norfolk the inmates who were responsible for the disruption in October of 1974.

10. In my opinion, if Plaintiffs are permitted to return to the population at M.C.I., Norfolk, there will be a very great risk of further disruption at the Institution.

(s)LARRY R. MEACHUM
LARRY MEACHUM

Subscribed and sworn to before me in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, this 22nd day of January, 1975.

(s) ILLEGIBLE

My Commission expires: Nov. 7, 1980.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MISC. No. 75-8006
ARTHUR FANO, et al.,
Plaintiffs, Appellees,
v.
LARRY MEACHUM, et al.,
Defendants, Appellants.

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

MEMORANDUM AND ORDER ON APPELLANTS' MOTION FOR STAY PENDING APPEAL
Entered January 23, 1975

Plaintiffs-appellees have presented substantial claims and the injunctive relief ordered by the district court indicates careful consideration. Nonetheless, we are aware that the precise requirements of constitutional due process in cases of intrastate prisoner transfers and where informant confidentiality is at stake have yet to be settled by the Supreme Court or in this circuit. We must also recognize that Massachusetts bears a heavy responsibility for the security of its correctional institutions and the safety of personnel and inmates. We therefore think that it would be premature to set aside the judgment of state correctional officials at least until such time as the merits of this appeal have, on an expedited basis, been determined.

The motion for stay pending appeal is granted until further order of court.

It is further ordered that the hearing on the merits be expedited in accordance with the following briefing schedule:

Four (4) copies of the brief for appellants and the appendix reproduced in compliance with Local Rule 11(d) with proof of service of one (1) copy of each upon opposing counsel is due to be filed on or before February 13, 1975;

Four (4) copies of the brief for appellees reproduced in compliance with Local Rule 11(d) with proof of service of one (1) copy upon opposing counsel is due to be filed on or before February 27, 1975, and

This case will be heard at the coming March, 1975 session.

By the court,
DANA H. GALLUP
Clerk
By (s) GRACE V. CAREY
Deputy Clerk.

[Cert. cc. Clerk, U.S.D.C., Mass.; cc: Messrs. Donahue and Stolzberg.]

United States Court of Appeals
For the First Circuit

No. 75-1033
ARTHUR FANO, et al.,
Plaintiffs, Appellees,
v.
LARRY MEACHUM, et al.,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[387 F. Supp. 664]
(WALTER JAY SKINNER, *District Judge*)

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Michael C. Donahue, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *John J. Irwin*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

Richard Shapiro, with whom *Robert A. Stolzberg* was on brief, for appellees

June 27, 1975

COFFIN, *Chief Judge*. We turn once again to the task of evaluating inmates' due process claims in the wake of *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). The district court provides us with a succinct summary of the facts, which the parties accept as accurate. 387 F. Supp. 664, 666-667 (D. Mass. 1975(. In the fall of 1974 there was a period of unrest at the Massachusetts Correctional Institution at Norfolk. There were

nine fires, thought to have been set, which were serious enough to require the presence of outside fire departments, and several other fires which were less serious. Plaintiffs were taken from the general population at Norfolk and placed in the Receiving Building at the Institution, which serves as an informal segregation unit. On October 25, 1974, each plaintiff was given a copy of a disciplinary report. The offenses charged against each plaintiff were described in substantially the same terms as appeared in the notices of reclassification hearings subsequently received. Since the alleged offenses were referred to the local district attorney for investigation and possible prosecution, the applicable regulation directed that no disciplinary hearings be held.[1]

On November 4 each plaintiff received a Notice of Classification Hearing. These notices reported that information received through reliable sources indicated that the plaintiffs were variously linked to the planning and execution of the fires, possession of contraband such as weapons, or trafficking in drugs. Classification hearings[2] were held, at which each plaintiff was represented by counsel. The evidence with respect to the alleged offenses, however, was given in closed session outside of the presence of plaintiffs and their counsel and was apparently, in each case, in the form of a recitation

[1]The regulation is based on the theory that to grant a hearing might create difficulties of either double jeopardy or denial of the privilege against self-incrimination. We do not share the view that prosecution may not constitutionally be based on conduct which is also the subject of disciplinary proceedings. *See, e.g., Palmigiano* v. *Baxter*, 510 F.2d 537 (1st Cir. 1974). Nor do we feel that this concern on the part of the Commonwealth, if well-founded, could immunize what would otherwise be a due process violation. *See Daigle* v. *Hall*, 387 F. Supp. 652, 660-62 (D. Mass. 1975); note 2 *infra*.

[2]We attach no significance for present purposes to the fact that these proceedings were for "classification" rather than "discipline". Defendants assert that "there are in the instant case as many administrative overtones as disciplinary ones", but we have already indicated that in our view the motive of prison officials, as such, is not properly a part of the due process calculus. *Gomes* v. *Travisono*, 510 F.2d 537, 541 (1st Cir. 1974). Whether the transfer is though of as punishment or as a way of preserving institutional order, the effects on the inmate are the same and the appropriateness of the action depends upon the accuracy of the official allegation of misconduct.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-252

LARRY MEACHUM, ET AL.,
Petitioner

v.

ARTHUR FANO, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

RICHARD SHAPIRO
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DIANNE KEEGAN
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JONATHAN SHAPIRO
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Boston, Massachusetts

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-252

LARRY MEACHUM, ET AL.,
Petitioners

v.

ARTHUR FANO, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported as follows: Fano v. Meachum, 387 F. Supp. 664 (D. Mass. 1975). The opinion of the Court of Appeals for the First Circuit is reported at 520 F. 2d 374 (1st Cir. 1975). Both opinions are included as an Appendix to the Brief of the Petitioners in support of their Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the First Circuit properly concluded that an inmate was entitled to a hearing prior to a transfer from a medium security institution to a maximum security institution when correctional officials

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had deliberately differentiated state prison facilities to provide graduated conditions of confinement within the state and when these same officials had stipulated in the United States District Court that the conditions of confinement in the maximum security institution were more adverse than those at the medium security facility?

2. Whether the United States Court of Appeals for the First Circuit properly concluded that an inmate was entitled to a summary of information derived from informant sources prior to or at a hearing involving his transfer from a medium security institution to a maximum security institution when state prison officials had exercised their sound discretion in promulgating institutional regulations requiring the disclosure of such information?

3. Whether the opinion of the United States Court of Appeals for the First Circuit is consistent with opinions of this Court and of other lower federal courts?

STATEMENT OF THE CASE

The prior proceedings and statement of this case are reported in the opinion of the United States District Court, Fano v. Meachum, 387 F. Supp. 664 (D. Mass. 1975) and in the opinion of the United States Court of Appeals for the First Circuit, Fano v. Meachum, 520 F. 2d 374 (1st Cir. 1975).

ARGUMENT

INTRODUCTION

The United States Court of Appeals for the First Circuit did not address the broad constitutional questions suggested by the petitioners but instead reached rather narrow and carefully reasoned legal conclusions based on (1.) a specific record developed in the United States District Court through the parties' own stipulation of facts and (2.) the particular circumstances of the Massachusetts correctional system.

The petitioners misstate the issue initially by asserting that the fundamental question is whether a state prisoner has an interest, protected by the Due Process Clause of the Fourteenth Amendment, in remaining in any particular correctional institution. In fact, the limited issue raised by the record in this case is whether an inmate who is subject to an intrastate transfer has a right to a due process hearing when the transfer in question is, by the petitioners' own admission, to an institution with more adverse conditions of confinement and when the Massachusetts correctional officials have deliberately differentiated institutions within the state prison system to provide graduated conditions of confinement.

Furthermore, contrary to petitioners' assertion, there is no constitutional issue raised in this case regarding the necessity of disclosing the substance of informant information when that information is being used as a basis of a correctional official's decision to transfer an inmate (Brief for Petitioners at 15). Again the issue considered by the United States Court of Appeals is much narrower, for the Court only decided that, once prison

officials have exercised their sound discretion to promulgate regulations which provide some inmates with specific procedural protections, these officials cannot arbitrarily deny other inmates who are similarly situated these identical rights without a showing that the particular regulations are unworkable or unduly burdensome. These rulings are not only consistent with prior decisions of this Court and of the lower federal courts but also reflect an admirable respect by the Unites States Court of Appeals for the First Circuit for state correctional practices and procedures.

Consequently, the resolution of this case by the Court of Appeals was manifestly correct. There is no conflict of decisions with either this Court or other lower courts, and there is no important question of Federal law requiring decision by this Court.

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The petitioners contend that the Court of Appeals, in deciding whether the protections of the Due Process Clause should be applied to the transfers in the instant case, failed to analyze the nature of the interest at stake in line with prior decisions of this Court. To buttress this contention, petitioners selectively quote from the Court of Appeals decision and utterly ignore the court's careful analysis of the due process issue. In considering "whether the decision to transfer inmates from Norfolk to maximum security institutions within Massachusetts is of such a character that the due process rights of potential transferees are brought into play" (App. 31), the Court of Appeals quite properly looked to this Court's decision in Wolff v. McDonnell, 418 U.S. 539 (1974) for guidance. In Wolff, this Court rejected the argument that the interest of prisoners in disciplinary procedures is not included in the "liberty" protected by the Fourteenth Amendment. This Court further concluded that, at least where the State has created the right to good-time credits and provided for withdrawal of the credits as a sanction for disciplinary offenses,

> "the prisoners' interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." Wolff v. McDonnell, 418 U.S. at 557.

In the instant case, the District Court and the Court of Appeals specifically found, on the basis of the stipulation of facts entered into by the petitioners, and of the particular arrangement of institutions within the Massachusetts correctional system, that serious deprivations resulted from the transfers in question; that the Department of Correction had intentionally differentiated the state prisons to provide graduated conditions of confinement; and that the transfers constituted a sanction for specific charges of misconduct. 1/

1/

The petitioners have never denied either that the transfers resulted in serious deprivations to the inmates or that the transfers were a direct result of written disciplinary charges, for which hearings were not held. The prison officials apparently attempted to circumvent the procedural requirements set forth in Wolff by cancelling the disciplinary hearings and scheduling classification hearings in their place. Fano v. Meachum, 520 F. 2d 374, 376-377 (1st Cir. 1975). In any event, prison officials must not be permitted to abrogate their responsibilities under Wolff by labelling their decisions to produce a desired result and, thus, attempt to circumvent constitutional requirements.

After careful consideration of this Court's decision in Wolff v. McDonnell, supra, the Court of Appeals then articulated the precise nature of the inmates' interest:

> "In light of the disadvantages accompanying the transfers here at issue, the legal principles articulated in Wolff, Gomes and the transfer cases decided by other lower federal courts compel the conclusion that the due process clause is applicable. At issue is not a simple loss of privileges, for which a hearing may not be required, Wolff, 418 U.S. at 571-72 n. 19, but a significant modification of the overall conditions of confinement. We hold that the inmate interests affected fall within the 'liberty' protected by the Fourteenth Amendment." Fano v. Meachum, 520 F. 2d at 378.

The court went on to note that the Commonwealth was under no constitutional mandate to establish a graduated prison system and implied that if the state had not done so, the inmates' interest may not have fallen under the protection of the Fourteenth Amendment. Id at 379 at note 6. Thus the analysis and the language of the United States Court of Appeals is entirely consistent with this Court's line of analysis in Wolff. Compare Fano v. Meachum, 520 F. 2d 379 at note 6 with Wolff v. McDonnell, 418 U.S. at 557.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH DECISIONS OF OTHER LOWER FEDERAL COURTS.

Petitioners contend that the lower federal courts are in conflict with each other and with the First Circuit in deciding whether procedural due process is required prior to transferring prisoners from one institution to another. This contention is simply erroneous. At least since the decision in Wolff v. McDonnell, supra, the lower courts have been unanimous in holding that a major adverse change in conditions of confinement, including an intrastate transfer of an inmate, gives rise to the protections of the Fourteenth Amendment "as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." Wolff v. McDonnell, 418 U.S. at 571-72 at note 19. See e.g. Clutchette v. Procunier, 497 F. 2d 809 (9th Cir. 1974, on rehearing, 510 F. 2d 809 (1975), cert. granted, U.S. (June 9, 1975); Palmigiano v. Baxter, 487 F. 2d 1280 (1st Cir. 1973), vacated, 418 U.S. 908 (1974), after remand 510 F. 2d 534 (1974), cert. granted U.S. (June 9, 1975); McLaughlin v. Hall, 520 F. 2d 382 (1st Cir. 1975); Stone v. Egeler, 506 F. 2d 287 (6th Cir. 1974); Ault v. Holmes, 506 F. 2d 288 (6th Cir. 1974); Gomes v. Travisono, 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded 418 U.S. 908, on reconsideration, 510 F. 2d 537 (1974); Carlo v. Gunter, ___ F. 2d ___, Civ. No. 75-1163 (1st Cir. August 4, 1975); United States v. Catalano, 383 F. Supp. 346 (D. Conn. 1974); Tai v. Thompson, 387 F. Supp. 912 (D. Hawaii 1975); United States ex rel. Myers v. Sielaff, 381 F. Supp. 840 (E.D. Pa. 1974); Robbins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974); Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974); Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975); Walker v. Hughes, 386 F. Supp. 32 (E.D. Mich. 1974); and Romero v. Schauer, 386 F. Supp. 851 (D.Col. 1974).[2/]

2/

It should be noted that the cases cited by petitioners(Brief at 11) in support of their contention were all decided prior to Wolff, at a time when some courts were still struggling with the question of the applicability of the due process clause to any prison proceeding. Even then, the majority of courts were in agreement as to the applicability of due process to prison disciplinary proceedings such as those conducted in the instant case. See, e.g., Schumate v. People of the State of New York, 373 F. Supp. 1166 (S.D.N.Y. 1974)(§1983 claim valid where the

Therefore, since Wolff v. McDonnell, the lower federal courts have been virtually uniform in requiring due process in a variety of prison proceedings, including intrastate transfers. The Court of Appeals decision is thus entirely consistent with decisions of other lower federal courts faced with similar issues.

2/ continued

character of confinement is substantially changed); Beatham v. Marson, 369 F. Supp. 783 (D. Conn. 1973)(due process would be applicable to intrastate transfer if inmate transferred for apparently disciplinary reasons); and Benfield v. Bounds, 363 F. Supp. 160 (E.D. N.C. 1973)(due process required prior to transfer from medium to close custody). See also, Sostre v. McGinnis, 442 F. 2d 178 (2nd Cir. 1971); Gray v. Creamer, 465 F. 2d 179 (3rd Cir. 1972); U.S. ex rel. Miller v. Twomey, 479 F. 2d 701 (7th Cir. 1973); King v. Higgins, 370 F. Supp. 1023 (D. Mass. 1974), aff'd 495 F. 2d 815 (1st Cir. 1974); Nolan v. Scafati, 430 F. 2d 548 (1st Cir. 1970); Kessler v. Cupp, 372 F. Supp. 76 (D. Ore. 1973); Bowers v. Smith, 353 F. Supp. 1339 (D. Vt. 1972); White v. Gillman, 360 F. Supp. 64 (S.D. Iowa 1973), and Landman v. Royster, 333 F. Supp. 621.

III. THE ISSUES IN THIS CASE ARE NARROW, ARE INEXTRICABLY BOUND TO CONSIDERATION OF MASSACHUSETTS REGULATIONS, AND DO NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners' assertion that the instant case "concerns the extent of an informant's right to remain anonymous when his information is being used as a basis for administrative decisions in the prison system" (Brief of the Petitioners at 13) also reflects a total misunderstanding of the issues and of the Court of Appeals' decision. The Court of Appeals decision reflects its awareness that the instant case is "extremely narrow" in scope. Fano v. Meachum, 520 F. 2d. at 374. The Court again quite properly looked to Wolff v. McDonnell, supra, as guidance for the procedures required when a decision of prison officials imposes a substantial adverse change in the conditions of confinement because of a specific prior conduct. These procedures include (1) notice which gives the charged party a chance to marshall the facts in his defense and to clarify what the charges are in fact; (2) an opportunity to be heard; and (3) a written statement by the factfinders as to the evidence relied on and the reasons for the action. Id at 564-65. The court concluded that these procedures should govern the intrastate transfer of prisoners from a minimum security to a maximum security facility on the basis of allegations of specific prior misconduct, absent a demonstration of substantial institutional reasons in a particular case for failing to follow such procedures.[3/] Fano v. Meachum, 510 F. 2d at 379.

3/

Any other result would be paradoxical in that it would allow prison officials to circumvent Wolff by substituting a transfer for other disciplinary sanctions and would thus raise serious equal protection problems. Gomes v. Travisono, 510 F. 2d at 539.

The Court's balancing of the respective interests of the State and of the prisoners correctly began with the realization that the applicability of due process protections beyond those articulated in Wolff was a matter left "to the sound discretion of the officials at state prisons." Wolff v. McDonnell, 418 U.S. at 565. See also, Palmigiano v. Baxter, 487 F. 2d 1280, 1286 (1st Cir. 1973). The Court properly considered the disciplinary regulations promulgated by the Department of Correction to be reflective of the proper balance struck by petitioners in the Massachusetts prison system. These disciplinary regulations explicitly provide for the use of informant information at hearings and requires the Board Chairman to summarize such information for the accused inmate.[4/] Thus, the balance was struck between the equitable treatment of prisoners and the security needs of the prison, in the first instance, by Massachusetts prison officials themselves. The Court of Appeals merely recognized that once these procedures are established for some inmates, they cannot be arbitrarily denied other inmates without a demonstration that the procedures are unworkable or unduly burdensome. Fano v. Meachum, 520 F. 2d at 380. This narrow holding not only reflects proper respect for the discretion of state corrections officials but also, quite correctly, recognizes that their discretion is not absolute. See Wolff v. McDonnell, passim.

4/ The pertinent section of these regulations is set out in the opinion of the District Court (App. 21) and of the Court of Appeals (App. 35-36).

Finally, the issues presented by this case are quite different from those raised in United States ex rel. Haymes v. Montanye, 505 F. 2d 977 (2nd Cir. 1974), cert. granted, U.S. (June 30, 1975). In Haymes, the prisoner alleged that his transfer from one institution to another within the state was intended as punishment and, therefore, due process protection was required. The two institutions, however, were both maximum security prisons with very similar conditions. In the instant case, the petitioners agreed that the conditions at the maximum security institution were more adverse than those at the medium security institution. In addition, the court found that the Commonwealth had deliberately differentiated medium and maximum security institutions to provide graduated conditions of confinement based on an inmate's behavior and that a transfer from M.C.I. Norfolk to M.C.I. Walpole was specifically authorized by the Commonwealth as a sanction for misconduct.

Finally, the factual issues left unresolved in Haymes have been furnished in this case by a stipulated record which provides substantial support for the Court of Appeals' conclusions.

CONCLUSION

The instant decision is, therefore, a singular product of the Massachusetts prison system. There are no important questions of federal law which do not depend on the unique circumstances of this case. Consequently, this case is clearly not appropriate for the Court's exercise of its discretion to grant a petition for a writ of certiorari.

The decision of the United States Court of Appeals was based on two considerations unique to Massachusetts: (1) a state-created system of institutions with graduated conditions of confinement, and (2) specific regulations promulgated by the

Department of Correction. Clearly, such a decision has little significance outside of the Commonwealth and, therefore, should not be reviewed by this Court by certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, et al.,
PETITIONERS,

v.

ARTHUR FANO, et al.,
RESPONDENTS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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BRIEF OF THE PETITIONERS

Opinions Below

This case has come before the court following an opinion of the United States Court of Appeals of the First Circuit which is reported at 520 F.2d 374 (June 27, 1975). The Court of Appeals affirmed in a two-to-one decision an opinion of the United States District Court for the District

of Massachusetts, reported at 387 F. Supp. 664 (D. Mass. 1975). Both opinions are contained in the Appendix. References hereinafter will be made to the applicable Appendix page number.

The District Court stayed part of its preliminary injunctive order pending appeal to the Court of Appeals by the petitioners. (App. 2) The Court of Appeals stayed the remainder of the District Court's order pending their decision on the merits of the appeal. (App. 142) The court further stayed issuance of the mandate pending the disposition by this court of the petition for writ of certiorari. This court granted certiorari on December 8, 1975.

Jurisdiction

The petitioners have invoked jurisdiction of this court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Commonwealth of Massachusetts has sufficiently created an interest in remaining in any one prison to be cognizable as "liberty" or "property" under the Fourteenth Amendment of the Constitution.

2. Whether a prison inmate who is transferred, within a state, from a medium security institution to a maximum security institution, when there is no imposition of disciplinary punishment at the receiving institution, is entitled, by virtue of the due process clause of the Fourteenth Amendment, to more than a notice of the proposed transfer and an opportunity to be heard in opposition.

3. Whether the due process clause requires the disclosure of informant information when, in the judgment of prison officials, such disclosure would create a substantial likelihood of harm to the informants.

Statement of the Case

This action was brought in the District Court of Massachusetts pursuant to 42 U.S.C. § 1983. Jurisdiction was alleged under 28 U.S.C. § 1343. The action was originally commenced by seventeen inmates confined to the Massachusetts Correctional Institution at Norfolk, a medium security prison within the Commonwealth of Massachusetts. Six inmates, the respondents here, later filed an amended complaint seeking declaratory and injunctive relief as well as damages. (App. 16) Respondents sought to have their imminent transfer from MCI, Norfolk to MCI, Walpole, the maximum security institution enjoined. The respondents, [hereinafter referred to as the "plaintiffs"], had been ordered transferred from Norfolk to Walpole by the Commissioner of Correction following a classification hearing.[1] These classification boards had

[1] There were no permanent regulations in the Massachusetts correction system, prior to March, 1975, which dealt with classification issues. Commissioner's Bulletin 72-1, which appears at page 109 of the appendix, was the official disciplinary policy of the Massachusetts correction system. It was not applicable to classification proceedings. Until March of 1975 the department operated with drafts of procedures and various informal procedures. None of these appear in the record before this court.

It is important to note that the MCI, Walpole regulations discussed by both of the courts below *absolutely were not official departmental regulations.* They were *draft procedures* followed at MCI, Walpole and at no other institution in Massachusetts. The only official regulations in this record are the disciplinary regulations. The "classification" hearings that are herein referenced were not the result of official administrative procedures. They were, rather, informal actions followed on an institutional level from policies which were in the process of being enacted.

Moreover, the action of the district judge in taking judicial notice of the disciplinary procedures in effect at Walpole effectively denied the defendants of their opportunity to be heard within the meaning of Rule 201(e) of the Federal Rules of Evidence. It was not apparent to either of the parties that judicial notice was to be taken until after the release of the District Court opinion. Aside from the questions which arise from the manner of taking

been presented information by the superintendent of the institution from inmate informants which linked the plaintiffs to various disruptive activities occurring within the institution, including the setting of numerous fires.

On August 31, 1974 there was a fire at MCI, Norfolk. This was the first of nine serious fires which were to plague the institution throughout the late summer and fall of 1974. A second fire occurred on September 12, 1974. A third fire occurred on October 13. There were two additional, and separate, fires on October 16. Another fire occurred on October 17. There were two more fires on October 21 and yet another fire on October 23. Each of these fires within the institution required the assistance of the fire departments from the surrounding communities. (App. 123-127) Indeed, the record reflects that on October 23 a fire occurred lasting between four and five hours requiring no less than forty-four firefighters from the surrounding communities to engage in controlling the blaze. (App. 124-127)

There were numerous other fires occurring within the institution which did not require the summoning of outside fire departments. On October 22 there were two separate fires. One in room 2-15 of the school building at the institution in which curtains and window shades showed fire damage. The exact time of the fire was unknown. The second October 22 fire occurred in a waste basket at the hospital. Its origins were unknown. (App. 123-124) All told, during the period between October 13 and October 31, 1974, damage in excess of $100,000 was reported at the institution. There was a loss of two living units and

judicial notice, the defendants seriously question the materiality of the *disciplinary* procedures in effect at Walpole to control the question of what *classification* procedures were being followed at Norfolk. It is also not unimportant to note that the only regulations introduced into evidence at the trial below were the departmental disciplinary procedures, Commissioner's Bulletin 72-1.

a partial loss of the laundry in the institution. (App. 120-123)

At some time during the month of October 1974, information was presented to Superintendent Meachum by inmate informants within the institution which linked the plaintiffs to the disruptions occurring at the prison. On October 16, 1974, plaintiff McPherson was taken from the general population at the institution and placed in a cell in the Receiving Building at MCI, Norfolk. On October 24, 1974, the plaintiffs Fano, DeBrosky, Dussault, Hathaway, and Royce were taken from the general population at Norfolk and placed in the Receiving Building. On October 25, 1974, the plaintiffs were given disciplinary reports. In each instance the subject matter of the disciplinary reports had been referred to the local district attorney for investigation and prosecution pursuant to Mass. General Laws, c. 127, § 38C.[2] (App. 56)

On November 4, 1974, the plaintiffs were served with general notices that they were to receive classification hearings before a department review board, to determine their custody status and a possible transfer. Fano, DeBrosky, and Dussault received the following notice:

> "The department has received information through a reliable source that you were in possession of instruments that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.
>
> These items and plans occurred during the period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to lives of

[2] Because of §VII(d) of Commissioner's Bulletin 72-1 no institutional hearing was held on the subject matter of the disciplinary reports. The defendants determined they were barred by the regulations from holding disciplinary hearings to impose institutional sanctions. (App. 118).

persons at MCI, Norfolk as well as serious property damage."

The plaintiffs Hathaway and McPherson received the following notice:

"The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring within MCI, Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

Inmate Royce was informed of the following:

"The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk (narcotics, barbiturates and/or amphetamines).

This occurred during a period of serious unrest at MCI, Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage." (App. 63-67)

On November 6, as well as on November 8, 11 and 13, classification hearings on a possible transfer were held for each of the plaintiffs on the information referenced in the classification notices. Each plaintiff was afforded a personal hearing before the classification board. Each inmate was represented by counsel or a law student. Each was allowed to make a personal statement to the board. All were allowed to present evidence in their behalf and, indeed, the record reflects that certain plaintiffs called correction officers and some submitted written statements

by correction officers on behalf of certain plaintiffs. The classification board heard evidence from each of the plaintiff's social workers concerning their activities within the institution. (App. 58-59; See also App. 68-109)

The classification hearings were opened by the board reading a prepared statement. Following the statement the board asked the plaintiff and his attorney to leave the hearing room while the board received informant information from Superintendent Meachum. In each instance Meachum appeared before the classification board and testified as to the information given to him and the reliability and credibility of the informant or informants. (App. 58, 143-144) The board earlier had refused to call and question the informants themselves but it did probe into the reliability of the informants through Meachum, who provided the board with a record of prior instances of each informant's information having proved reliable. (App. 143-144; Also, App. 68, 75, 81-82, 92, 100, 105) After Meachum completed his testimony each plaintiff was brought back into the hearing and testimony continued. At the conclusion of each hearing, the board announced its recommendations. Hathaway and DeBrosky were to be transferred to MCI, Bridgewater. Fano, Dussault, and McPherson, were ordered transferred to MCI, Walpole. Charles Royce was recommended to be held in administrative segregation for thirty days and was to be given a second classification hearing at the end of that time. The plaintiffs were orally informed by the board following the conclusion of the hearings that the information presented to it by Superintendent Meachum was the basis of the board's decisions and recommendations. (App. 59, 60; Also 68-109)

Each plaintiff except Royce appealed to the commissioner to review the board determination and to request

that the commissioner order that they be once again placed in general population at Norfolk. The Commissioner of Correction personally reviewed the appeals. He did not make an independent investigation other than speaking with members of the classification board and Superintendent Meachum. Except for these conversations the Commissioner of Correction relied wholly upon the written reports prepared by the classification board for him, and recommendations of the board. In each case, the appeal of the plaintiffs was denied. The recommendation of the board in the case of Fano, Dussault, Hathaway and McPherson was upheld by the commissioner. The appeal of DeBrosky resulted in the commissioner's recommendation to transfer DeBrosky to MCI, Walpole rather than MCI, Bridgewater. The commissioner overruled the board with respect to the plaintiff Royce. The commissioner directed that Royce be transferred to MCI, Walpole rather than remaining in administrative segregation at Norfolk. (App. 60-61)

Royce was notified of the commissioner's decision in a memorandum dated November 21, 1974. Each of the other plaintiffs was notified of the commissioner's decision by a letter directed to their attorney. Each letter clearly indicated that the recommendations of the classification board were implemented only after considerable thought and evaluation of the informant information and the reliability of that information. (App. 50-53)

Sometime subsequent to Commissioner Hall's decision, the plaintiffs were transferred to MCI, Walpole. At MCI, Walpole they were subject to no administrative punishment. They suffered no loss of good time and were not placed in segregation. As a matter of course the fact of the transfer was noted on their institutional record and would, therefore, be considered by various administrative

agencies within the Department of Correction.[3] Furloughs were available at MCI, Walpole, and remained available to each plaintiff upon eligibility at Walpole.

Summary of Argument

1. There is no constitutionally-recognized interest, protected by the Fourteenth Amendment, which circumscribes the power of a state to transfer an inmate from one prison to another. The due process clause of the Fourteenth Amendment operates only to protect identifiable liberty or property interests which are either inherent in the Constitution or created by virtue of a state statute, regulation or pattern of conduct. The petitioners contend that the Commonwealth of Massachusetts has created no such liberty or property interest which the Constitution protects and they further argue that there is, in the Constitution, no inherent liberty interest which would prevent the state from transferring a prisoner from one prison to another within his jurisdiction of commitment.

The Court of Appeals for the First Circuit has focused its attention on the "weight" of the interest asserted by the state prisoners rather than on the "nature" of the claim and has rested a subjective judgment on loss to the individual inmate. Petitioners contend that while a prisoner may have a wish or desire to remain in a particular institution these wishes or desires are not constitutionally recog-

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[3] Any change in an inmate's condition or status of confinement in the Massachusetts correction system would be noted in an institutional record. The fact of the entry would, therefore, necessarily be included in the inmate's institutional record. The consideration given that institutional record by a parole board, a furlough board, or another administrative agency would vary as to the individual's entire institutional record. It may have some effect as to furlough, parole, work release, or other privileges, or it may have none at all. The result of the entry is entirely speculative.

nized interests. The loss which results to an inmate as a consequence of transfer is, accordingly, not a "grievous loss" of constitutional dimension.

There has been no interest created by the Commonwealth of Massachusetts which entitles an inmate to remain in any particular institution within its correction system. There exists no statute, regulation, or factual pattern which can be set forth to assert that any inmate has a legitimate claim of entitlement to remain in that institution. In Massachusetts, an inmate may be transferred from one institution to the other for a variety of reasons including population control, program availability, adjustment to institutional environment or numerous other factors, some of which are incapable of precise identification. Since the Commonwealth has created no such interest, there exists no "legitimate claim of entitlement" to remaining in any particular institution. Therefore, no "property" interest, cognizable by the Fourteenth Amendment, exists so as to require procedural protection.

2. If the Court should determine that some process was indeed required, petitioners contend that the Constitution was fully satisfied by a notice to the inmate of the proposed transfer and an opportunity for that inmate to be heard in opposition. There is a functional difference between a disciplinary hearing, as was the case in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and a transfer situation as represented by the instant case. When a situation is presented, such as is presented by the facts below, the decision whether or not to transfer must necessarily rest in the sound discretion of prison officials. When informants identify certain individuals as either the cause of disruption or the likely cause of disruptio at an institution, the correction officials' obligation to the informants, as well as their obligation to other inmates, dictates that they investigate the credibility and relibility of the information and

that they make a determination as to whether or not a transfer is required.

The function of a disciplinary hearing is to determine the truth or falsity of disciplinary matters. The function of a board sitting to judge whether or not a transfer should occur may consider a myriad of factors including evidence of past or predicted future misconduct. Unless procedures could be set out which would absolutely guarantee that the informants' charges could be disproved, then the source of the information must be protected by refusing to allow confrontation and by excluding any evidence which would tend to identify the informant sources. There can be no fundamental unfairness to an inmate facing transfer if he is allowed to appear before the board and argue in opposition to the transfer.

In the instant case not only were the inmates allowed to appear before the board, but they were also represented by counsel and allowed to call witnesses, present evidence, and appeal the decision of the board to the Commissioner of Correction. Further, the superintendent of the institution appeared before the board, *in camera*, and testified to the board that he had probed the credibility of the informants and the reliability of their information. The board examined the superintendent as to his information and independently determined the reliability of the information by examining the Superintendent. Such procedures fully satisfied due process.

3. The Court of Appeals for the First Circuit misapprehended this court's meaning in *Wolff* v. *McDonnell*, *supra*. The Court of Appeals erred when it referred to language in *Wolff* v. *McDonnell* as "cryptic" and, in its error, failed to appreciate the basic rationale behind *Wolff* v. *McDonnell*, which required a sensitive balancing of interests in matters of prison discipline. Prison officials deal in highly volatile situations. They must be afforded

the widest possible discretion consistent with fundamental constitutional guarantees. In the instant case, the prison officials have acted wholly within the spirit of *Wolff* in balancing the interest of both inmate and informant. In transfer cases, where both the security of the institution and the physical safety of its occupants are implicated, the Court should be hesitant to impose detailed and specific procedures. While notice and an opportunity to be heard are fundamental to any interest protected by the Fourteenth Amendment, further procedures should be left to the good faith of corrections officials and not inflexibly set into constitutional law.

Argument

I. THERE IS NO CONSTITUTIONALLY-RECOGNIZED INTEREST PROTECTED BY THE FOURTEENTH AMENDMENT WHICH CIRCUMSCRIBES THE POWER OF A STATE TO TRANSFER A PRISONER FROM ONE PRISON TO ANOTHER WITHIN THE SAME JURISDICTION OF COMMITMENT.

A. *The Due Process Clause of the Fourteenth Amendment Applies Only To Protect Recognized "Liberty" or "Property" Interests.*

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972). The Fourteenth Amendment does not operate in each and every case of governmental action because ". . . the range of interests protected by procedural due process is not infinite." *Id.* at 570.

The determination of whether the interest comes within the Fourteenth Amendment's definition of liberty or property is made by analyzing and identifying the nature of the interest and not by calculating the weight or gravity of the interest. *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Board of Regents* v. *Roth, supra; Morrissey* v. *Brewer*, 408 U.S. 471 (1972). An identification of a protected interest in property is generally more involved than when determining whether or not "liberty" within the meaning of the Fourteenth Amendment is involved because ". . . [p]rotected interests in property normally are not created by Constitution. Rather, they are created and their dimensions defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss* v. *Lopez, supra* at 572-573, quoting *Board of Regents* v. *Roth* at 577, and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), where good time credits were accumulated under state law.[4]

Board of Regents v. *Roth*, supra, made it clear that the "weight" of the interest asserted was an improper con-

[4] This court found in *Wolff* v. *McDonnell*, supra, that the deprivation of good time credits involved a matter of "real substance" and was "sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle [the prisoner] to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state-created right [was] not arbitrarily abrogated" 418 U.S. at 557. The fact that *Goss* v. *Lopez, supra*, talks about the *Wolff* v. *McDonnell* good time credit issue as one of a state created "property" interest and *Wolff* itself refers to the interest as "sufficiently embraced" within the Fourteenth Amendment "liberty" interest does not render *Goss* and *Wolff* inconsistent.

Since *Wolff* involved good time credits, a state created interest of monumental importance to a prisoner, as it involves the quickening of his ultimate release, a true "liberty" interest was involved. However, since the interest itself was state created it also bears those aspects of the property rights spoken of in *Goss* v. *Lopez, supra*. *Wolff* deals with a liberty interest insofar as release is always ultimately a liberty question. It is a property concept within the meaning of the Fourteenth Amendment because the right created by the state is clearly "entitlement" within the meaning of *Goss* v. *Lopez, supra*; *Board of Regents* v. *Roth, supra*; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); and *Perry* v. *Sinderman*, 408 U.S. 593 (1972). Of course, *Wolff* may also clearly be read as finding a state-created "liberty" interest. *Id.*, at 558.

sideration in determining whether or not the right was applicable. *See also* Note, *Specifying The Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975). The Court recognized in *Roth* that the teacher's interests in his re-employment "were of major concern to him" 408 U.S. at 570, but it also recognized that the determination of whether procedural due process applied was, in the first instance, related to the nature of the interest rather than to the gravity of the deprivation that he might suffer. *See also Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring). Indeed, *Goss* v. *Lopez, supra*, stated that as "long as a property deprivation is not *de minimis*" the gravity of the interest was "irrelevant to the question of whether account must be taken of the due process clause." *See* Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. at 1512, n. 8.

This analysis is of primary importance in the instant case because the Court of Appeals, below, misapplied the requirements that this Court has laid out in determining whether or not due process applied in the first instance. *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir., 1973), was vacated and remanded following this Court's decision in *Wolff*. In the remand, at 510 F.2d 537, the Court of Appeals misapprehended this Court's holding in *Wolff* and stated that *Wolff* reaffirmed the proposition that "prisoners suffering the prospect of serious deprivations are entitled to some process". 510 F.2d at 539. The First Circuit's error was repeated in the instant case. After comparing the differences between interstate transfers, as was the case in *Gomes*, and intrastate transfers, as was the situation in the case at bar, the Court of Appeals stated that the disadvantages here were both more serious and more certain than those flowing from interstate transfers, and thus the weight of the deprivations mandated similar procedures to those required by *Wolff*. In doing this the court specifically cited its second *Gomes* opinion that interpreted *Wolff* as holding that "prisoners suffering the prospect of *serious deprivations* are entitled to some process". (Emphasis supplied).

In the opinion below, the Court of Appeals never specifically analyzed the nature of the interest asserted. It, rather, assumed that there was a protected liberty interest in a prisoner remaining at an institution within the Commonwealth of Massachusetts by weighing the loss to the inmate upon transfer. The petitioners assert that the Court of Appeals was in error, not so much for the conclusion it reached, although we question that also, but, rather. for its failure to analyze the nature of the interest asserted in determining whether or not process was due.[5]

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[5] The First Circuit's view of due process as dependent upon the "weight" of the interest is not unusual. Although the cases are far too numerous to cite, a review of relevant lower court decisions in the prison context will almost invariably find the analysis turning on the question of how much loss the prisoner has suffered. Once the court determines that the loss has reached a certain quantum then due process is almost always mandated. Indeed, in *Carlo* v. *Gunter*, 520 F.2d 1293 (1st Cir., 1975) *vacating* and *remanding* 392 F. Supp. 871 (D. Mass., 1975), the First Circuit made no effort whatsoever at analyzing the nature of the interest. Rather, it simply looked at the alleged sufferings involved and determined that there was enough of an interest to mandate procedures. In doing so it vacated a very thoughtful order made by a district judge after a trial which occurred during a riot at the maximum security institution in Massachusetts. The Court of Appeals later denied rehearing without argument. The issue in question in *Carlo* was whether due process applied to *a cell reassignment within the same institution*. The First Circuit held process was due, even though the transfer was within the same prison, because harsher conditions of confinement were involved.

B. *Absent a Statutory Basis, a System of Regulations, or a Clearly Defined Factual Pattern a Prisoner Has Only a Unilateral Expectation of Remaining in Any Particular Prison.*

1. *A prisoner has no "liberty" interest in remaining in any particular prison within the Massachusetts correctional system.*

It is clearly established that the Constitution does not stop at the prison gate. *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1969). Petitioners do not contend otherwise. Indeed, in the First Circuit, at least since *Nolan* v. *Scafati*, 430 F.2d 548 (1st Cir. 1970), Massachusetts prison officials have been aware that they were under an affirmative obligation to provide "some assurance of elemental fairness" when dealing with substantial individual interests of prisoners. *Id.* The issue has never been whether the Constitution was applicable as a general matter but rather the degree to which it controlled in specific instances. It is clear that "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen . . . ." *Wolff*, at 555. Because liberty in its full sense is a concept of free men its retraction is warranted and justified by the considerations underlying our penal system, upon a criminal conviction. *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). "There is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff*, at 556, but what a "liberty" interest is in the prison context is a difficult and somewhat obscure question; particularly so when the "liberty" is allegedly a right to remain in one prison rather than another.

Wolff held that a state-created statutory right was "sufficiently embraced" by the Fourteenth Amendment so

as to mandate procedures to ensure that the right was not arbitrarily abrogated.[6] 418 U.S., at 557.

In the instant case Massachusetts has created no interest. As Judge Campbell said in his dissent below:

> ". . . it should be recognized that Massachusetts has not conferred a statutory right upon inmates to be at one institution rather than another. While Walpole is a more secure facility than Norfolk, a prisoner has no vested right to serve his term in one place rather than the other." (App. 153).

This case then differs from *Wolff*. The majority opinion below, however, did not address the issue in terms of a state-created interest, because to the First Circuit the question was not the nature of the interest. To the Court of Appeals the ". . . question thus becomes one of whether the detriment worked by an intrastate transfer from a medium security institution to a maximum security prison is *serious enough to trigger the applications of due process protections.* (App. 147). (Emphasis supplied.)

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[6] Good time credits have always been regarded as something of a special interest to state prisoners. Prior to *Wolff*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) presented the question of whether or not an action could be pursued under 42 U.S.C. §1983 for the restoration of good time credits. The deprivation of good time credits is an issue of significantly different importance to an inmate than one affecting his specific place of confinement. Indeed, in *Wolff*, release could have been affected by up to eighteen months. Petitioners suggest that not only is good time an issue of fundamental importance to an inmate, but it is also something that is susceptible of objective identification when determining whether or not a grievous loss exists. Limiting determinations of grievous loss to such objective determinations as deprivations of good time or placement in segregation at the receiving institution would limit subjective approaches by the lower courts. Such a limitation to objective factors would prevent the question of whether grievous loss has been suffered from turning on subjective considerations going to the weight of the interest asserted.

We contend the Court of Appeals was in error. A prisoner has no liberty interest in being in a particular prison. Confinement in any institution creates no right to remain in that institution. As stated by Judge Campbell:

> "one must ask not only whether a particular event may cause loss to the prisoner but whether one in the position has any claim to what was taken away."

Judge Campbell further amplified this in a footnote to the dissent:

> A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer "grievous loss", but the nature of the organization and of their role precludes acknowledging any "liberty" or "property" right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on "privileges" as opposed to "rights", it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to any protection against that loss. (App. p. 154)

An argument which turns on the gravity of the deprivation will almost always require a subjective judgment by the individual judge. This creates a danger that constitutional analysis will be personalized and that "procedural" due process will become a substantive matter. *See Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (dissenting opinion of Mr. Justice Black). Again, as stated by Judge Campbell:

> "Prisoners are, by definition, prisoners. Changes in the conditions of confinement, whether involving a

> different cell assignment, a new meal schedule, or transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard and rehabilitate. To treat them as "liberties" belonging to the inmate invites greater interferences with the management of prisons than seems either wise or constitutionally mandated." (App. 154).

Liberty is partially the ability to come and go, to do or not do, to conform or to rebel. It is a concept of free men rendered largely inapplicable by a criminal conviction. "The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual . . ." *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701, 712 (7th Cir. 1973), but a criminal conviction does mean, at the very least, that the individual can no longer choose where he would prefer to be or not be. Unless the state has created or conditioned the interest, confinement in a particular institution does not implicate any "liberty" protected by the due process clause.[7]

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[7] Petitioners contend that there is no distinct "liberty" interest implicated by an entry in the prisoner's institutional file. A prisoner confined to a maximum or medium security institution does not have the same qualitative interest in maintaining his community standing as the students had in *Goss* v. *Lopez*, supra at 574 or the teacher had in *Board of Regents* v. *Roth*, supra at 573. The same danger to community standing does not exist here as existed in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) because the individuals in question are simply not similarly situated. There is, and must necessarily be, harsh as it may seem in terms of constitutional analysis, a distinction between protections the due process clause affords free men when they are in an adversary relationship with the government and the protections that the constitution affords a prisoner confined as the result of a criminal sentence. There is no separate interest effected by an entry in the prisoner's institutional record. An entry that might indicate a transfer is nothing more than a reflection of the state's power to control, safeguard, and rehabilitate the individual given to their custody as a result of a criminal conviction.

2. *A property interest exists only when created by statute, regulation, or identifiable rules.*

Petitioners recognize that even if there is no liberty intrest inherent in a prisoner's desire for confinement in a particular institution the state may well create a "property" interest by statute, regulation, or a clearly defined factual pattern which can be shown to have created an entitlement in the inmate. *Goss* v. *Lopez* recognized that property interests are not normally created by the Constitution, 419 U.S. at 572.

> Rather, they are created and their dimensions defined by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) had statutory rights to their benefits. The inmates in *Wolff* had statutory rights, absent serious misconduct, to their good time credits. The teacher in *Perry* v. *Sinderman* was allowed to prove a *de facto* tenure program. The employee in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) was allowed to invoke the procedural protections of regulations entitling him to continued employment absent sufficent cause for discharge.

As *Roth* noted, certain attributes of property interests have emerged from the procedural due process cases decided by this Court in recent years.

> To have a property interest in a benefit, the person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient

> institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily underlined. It is a purpose of the constitutional right of a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. at 577.

In the instant case there are no statutorily created rights to remain in, or go to, any institution in the Commonwealth of Massachusetts, subsequent to the original sentencing decision. Until March of 1975 there were no specific regulations which dealt with the question of "classification" transfers. *See generally Carlo* v. *Gunter*, 520 F.2d 1296 n. 5. Until March of 1975 the Commonwealth of Massachusetts made do with a variety of draft procedures and informal policies which dealt with the question of intrastate transfer. At the time of the transfer of these plaintiffs there had been no regulations filed by the Massachusetts Department of Correction pursuant to the Commonwealth's Administrative Procedure Act. See Mass. General Laws, ch. 30A, § 5, ch. 30, § 37.

Moreover, there is nothing in the record that would indicate the existence of any *de facto* system such as was the case in *Perry* v. *Sinderman*. There are no reasons apparent in the record for the plaintiffs confinement at Norfolk. There is no conduct, evident from the record, which would indicate any pattern of behavior on the part of state officials which could be alleged to create a property entitlement in remaining at MCI, Norfolk.

The District Court and Court of Appeals both relied substantially upon the fact that the Commonwealth of Massachusetts had deliberately differentiated in levels of confinement between these two institutions. The petitioners suggest that the levels of confinement in existence at these institutions are constitutionally irrelevant absent a legi-

timate claim of entitlement to reman at either of the institutions. Absent a state created interest, cognizable as either liberty or property, the prisoners' interest in remaining in any particular institution constitutes only a unilateral expectation requiring no procedural protections prior to termination.

The fact that there may be, arguably, a form of "punishment" involved, or that the transfer itself might result in some form of hardship to the prisoner is also constitutionally irrelevant unless it can be shown that a legitimate claim of entitlement exists to the particular benefit in question.[8] If the prisoner's liberty or property interests are not implicated, the motivation of the Commonwealth in transferring the prisoner is of no constitutional significance. Unless a claim of entitlement can be established by the plaintiffs there is no constitutional interest affected by a transfer from a medium security institution to a maximum security institution. There are no rules in Massachusetts which prevent an inmate from being transferred from one prison to any other prison. Any inmate confined within the Massachusetts correctional system is subject to transfer no matter how exemplary his conduct at an institution. As a matter of practice, of course, this rarely, occurs; but, the harsh reality of prison life dictates that such questions not be frozen into a constitutional rule.

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[8] Petitioners also suggest that transfers of inmates from one institution to another is far less of a "grievous loss" than found by the Court of Appeals. While there is no doubt that MCI, Norfolk is a more desirable institution than MCI, Walpole, there is no loss in the instant case which would correspond to the loss suffered by the inmates in *Wolff* (up to 18 months good time) and *Morrissey* v. *Brewer*, (revocation of a conditional liberty, the freedom to be at large in society with minimal restraints). Indeed in the instant case there was no loss of good time and no segregation at the receiving institution. See n. 6, *supra*.

As stated by Judge Campbell:

> As prisoners are involuntary inhabitants and some are dangerous and unpredictable, administrators must decide whether a given inmate is more likely to escape from one place than another, and whether the mere presence of an inmate in a given setting is likely to be volatile and more dangerous. Such judgments may often be little more than educated guesses based on suspicions. They may involve predictions of future dangerousness which in turn echo assumptions as to the inmates role in past disturbances. While I can understand the argument that no adverse assumptions should ever be made without minimal due process — hearing, confrontation of witnesses, and the like — I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards, but I do not think the Constitution can reasonably be said to require them. (App. 155)

II. EVEN IF THERE IS FOUND IN THIS CASE AN IDENTIFIABLE "LIBERTY" OR "PROPERTY" INTEREST PROTECTED BY THE CONSTITUTION SO AS TO MANDATE THE PROTECTIONS OF THE DUE PROCESS CLAUSE THE PROCEDURES FOLLOWED BY PETITIONERS WERE FULLY ADEQUATE.

A. *Balancing the Interests in This Case Requires That the Paramount State Interest Be Recognized.*

The procedures that ". . . due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

"The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation." *Id.* As noted by Mr. Justice Frankfurter in *Joint Anti-Facist Committee* v. *McGrath,* 341 U.S. 123, 162-163 (1951) "Due process, unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions . . . ." *See also Cafeteria Workers* v. *McElroy, supra,* at 895.

In determining the precise nature of the government function the question involved in the prison context is necessarily more complex.

> ". . . It is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints to the very different situation presented by a disciplinary proceeding in a state prison." *Wolff,* at 560.

Because of the atmosphere in which the hearings must occur, the full panoply of due process procedures that have been required in other contexts are inappropriate to the prison environment. As *Wolff* noted:

> "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. . . . They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life . . . Guards and inmates co-exist in direct and inmate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace.

> Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner."

418 U.S. at 561-562.

If, as *Wolff* found, the disciplinary proceedings in the Nebraska Penal Institution required a sensitive and considered application of procedures, what must be the case here? The record discloses that since the last week of August, 1974, the institution at Norfolk had suffered series of fires which clearly placed the security of the entire institution in jeopardy. Petitioners contend that when Meachum was informed of the plaintiffs' involvement in the disruptions occurring at the institution he was justified, if not obliged, to take immediate and direct action to secure and order the institution. Because the precise nature of the government function involved in this case is of such sensitivity and such importance to the safety of the Norfolk population, petitioners suggest that the procedures required of them, assuming arguendo that procedures were in fact mandated, are limited to notice to the inmate of the proposed transfer and an opportunity for that inmate to be heard in opposition to the transfer. Petitioners suggest that to require more complete procedures in a situation such as presented by this case would be to add to the potential danger inherent in such situations, as well as to possibly escalate the confrontations which necessarily occur between inmates and authority when any question of misconduct is present. *cf. Wolff,* at 562.

Moreover, transfers may be carried out for a variety of reasons. They may occur for reasons of punishment. They may be carried out for reasons of space allocation within the institution, for reasons of program availability or unavailability at a particular institution, or simply on general grounds which are not capable of precise identifica-

tion. The Court of Appeals in its opinion below, following its earlier opinion in *Gomes* v. *Travisono*, 510 F.2d 537 (1974) refused to analyze the transfers in terms of whether they were of an administrative rather than punitive nature. In doing so, we suggest, the Court of Appeals was, in effect, requiring correction officials to *prove* charges of misconduct as a matter of *procedural* due process prior to the transfer. If the Court of Appeals is correct in assuming that administrative and punitive transfers ought not to be distinguished then the purpose of the hearing, whatever the reason for the transfer, will be always to force correction officials to substantially justify the purpose of whatever administrative action they are going to take, i.e., transfer. For a further example of the Court of Appeals analysis insofar as it tends to a substantive judgment of what correction officials do *See Carlo* v. *Gunter*, 520 F.2d at 1297, where Judge McEntee required hearings to determne whether or not there was a "reasonable basis" *for a cell transfer within the same institution.* The approach of the Court of Appeals requires substantive rather than procedural judgments. The approach is itself a subtle repudiation of the due process concept that the procedures themselves will insure the accuracy of the fact finding process. *cf. Arnett* v. *Kennedy, supra,* at 178 (opinion of Mr. Justice White).

As stated by Judge Campbell in a footnote to his dissenting opinion below:

> Administrative realities may sometime necessitate the flexibility to transfer even on the basis of demonstrably inadequate information. If, for example, the warden has narrowed the likely cause of disruption down to several inmates, he may deem it prudent to transfer all without having proof that all are involved. A forty percent risk that an inmate will disrupt or set a fire may, in some circumstances, be too great to take. The safety of other inmates and prison personnel may have to be weighed against fairness to certain individuals.

B. *Due process was satisfied by notice of the proposed transfer and an opportunity to be heard.*

In terms of analyzing the precise nature of the governmental function and interest, it should be apparent that whatever the range of alternatives available to correction officials in other situations, they were simply not present here. Unless a hearing can determine with absolute certainty the fact that the informants are incorrect, there is no alternative to a transfer. Meachum's obligation to personnel at the institution, not to mention the inmates confined to the institution, dictated that he take specific and firm action to remove those who had been identified to him as the cause of the disruption. To require, as the District Court and the Court of Appeals have required, that the case be treated as one would treat an ordinary administrative matter is to both misapprehend the nature of the problem which faces correction officials as well as to fail to appreciate the sensitivity and dangers inherent in a prison environment. One may gather from the opinions of the Court of Appeals that correction officials are required to establish, on the record, a "rational basis" to effect a transfer. See 520 F.2d at 1297. The analysis of the Court of Appeals goes substantially beyond what this Court required in either *Wolff* or *Morrissey* v. *Brewer, supra.*

A hearing which will determine whether or not good time credits were justifiably removed is functionally different than a hearing which must determine whether or not a purportedly disruptive inmate should be removed from an institution. The question of whether the misconduct

occurred so as to justify the removal of good time is an issue generally susceptible of resolution within the institution. Once the hearing occurs and a decision is reached the matter is closed. In cases similar to the instant one, however, no such resolution can be reached. Even if an inmate can establish by reasonable evidence that he might not be the cause of disruption his transfer may yet have to occur because the obligations of the superintendent to the safety and security of other individuals may well prevent him from waiting until there is uncontrovertible proof of a bad act. (See App. 154, n. 2).

The transfer of an inmate based on a prediction of future bad acts is, then, an issue radically different from the question faced by this court in *Wolff*. In disciplinary proceedings the hearing may encompass the question of whether or not the alleged misconduct did in fact occur. Action taken by correction officials as a result of that hearing is then truly punitive. A transfer hearing is an entirely different matter. It may bear aspects of a disciplinary hearing insofar as allegations of past misconduct may be heard but it is also truly "administrative" insofar as it must determine the question of how past conduct bears upon future behavior; and whether or not that behavior is consistent with institutional goals. The question of whether to transfer an individual from one institution to another is rarely, if ever, susceptible of the precise issue identification that is the case in disciplinary proceedings. Questions such as those which faced the Classification Board below are not susceptible of easy "yes" or "no" answers. Hard decisions have to be made and, if any procedures are found to be due, they must necessarily recognize the need for administrative flexibility.

Once it is determined that due process procedures are required the question then becomes what particular procedures are due under the circumstances of the case.

> [A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof however informal.

Londoner v. *Denver*, 210 U.S. 373, 386 (1908).

In *Joint Anti-fascist Refugee Committee* v. *McGrath*, supra, Mr. Justice Frankfurter said that "a person in jeopardy of serious loss" must be given "notice of the case against him and an opportunity to meet it." 341 U.S. at 171-172. This court recognized in *Wolff* v. *McDonnell* that the procedures appropriate to a prison administrative hearing were necessarily more limited than those required outside of the prison context. Nevertheless, when a process is found to be due, the question remains as to what must be minimally afforded. Judge Henry Friendly has asserted that the elements of a fair hearing must include

1. An unbiased tribunal;
2. Notice of the proposed action and grounds asserted for it;
3. An opportunity to present reasons why the proposed action should not be taken.

Friendly, *"Some Kind of Hearing"*, 123 U. Penn. L. Rev. 1267 (1975).

Although he discussed other elements of due process, Judge Friendly found these procedures to be fundamental. Petitioners suggest that Judge Friendly's statement is a fair and adequate criteria for what ought to be required here. As this Court recognized in *Wolff* the right to present evidence was basic to a fair hearing. The right to call witnesses, however, carried the potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out

the correctional program. 418 U.S. at 566. Petitioners suggest that the rationale employed in *Wolff* should be controlling to the facts of this case.

The plaintiffs in the instant case were afforded a notice of the proposed transfer. They were given the opportunity to be heard in opposition to the transfer. They were represented by competent counsel at the hearing, something that *Wolff* did not mandate. And, they were further afforded the right to call witnesses and appeal the decision of the board to the Commissioner of Correction and to make such arguments to the Commissioner as would bring to his attention what they regarded as unfair treatment in the institution. In the context of this case, petitioners surely cannot be required to do more.

C. *Due Process Does Not Require That Informant Information Be Disclosed When Doing So Will Jeopardize Institutional Security or the Safety of the Informants.*

The basis of the action by the Classification Board was information presented to it by Superintendent Meachum. When Meachum appeared before the board, the board inquired into the credibility of the informants and the reliability of their information. It was determined that to provide the plaintiffs with a summary of the evidence beyond the general assertions contained in the notice, and the oral representation that the decision of the board was based upon Meachum's testimony, would be to seriously compromise the physical safety of the informants.

This situation was clearly foreseen by this court in *Wolff* when it said:

> "Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing

> reasonable personal safety for guards and inmates may be at stake to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process." 418 U.S. at 562.

Petitioners suggested to the Court of Appeals that the information given to the inmates was within the parameters recognized by *Wolff* ". . . when personal or institutional safety [was] so implicated" that the representations made to the inmate ". . . may properly exclude certain items of evidence." 418 U.S. at 565. The Court of Appeals rejected the petitioner's contention and stated "this *cryptic reference* offers us little assistance in our effort to determine whether the prison officials were within their authority here in declining to reveal substance of the informant statements." (App. 154) (Emphasis supplied).

Petitioners suggest that this Court's language was far from "cryptic". We think this Court recognized in *Wolff* the significant dangers that exist in prison confrontations. In the circumstances present here, a notice of the proposed transfer, an opportunity to be heard in opposition to the transfer, as well as the opportunity to present testimony and appeal to the Commissioner of Correction was fully adequate to satisfy due process. These procedures allowed the inmate to state his version of the events occurring at the institution and to argue against the transfer presenting whatever evidence he saw fit. From the perspective of what the hearing was designed to accomplish, the procedures followed by the petitioners were also functionally adequate.[9]

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[9] Petitioners contend, obviously, that the Court of Appeals misapplied *Wolff* v. *McDonnell*. However, petitioners also suggest that the Court of Appeals has approached the problem of informant information in a rather inconsistent manner. Compare the First Circuit's resolution of the instant case with its resolution of the case of *McLaughlin* v. *Hall*, 520 F.2d 382 (1st Cir., 1975), a case

It is important to note that commentators agree with the position asserted by the petitioners as to the need to protect the safety and security of the informants. Judge Friendly describes the informant cases as the "strongest" ones for dispensing with the necessity for full procedural protections. 123 U. Penn. L. Rev. at 1286; *see also,* 88 Harv. L. Rev. at 1531. In this case the petitioners have been able

> ". . . to point to identifiable individuals whose interest in personal safety would have been jeopardized by granting the requested procedures. Second, such persons . . . clearly have standing to enlist the protections of the courts if their safety were imperiled by private individuals. Finally, the causal nexus between withholding requested procedures in preventing injury to the rights of informants [is] clear and direct. Therefore, this aspect of the *Wolff* decision seems to be a clear case when the government is justified in limiting the individual's right to due process in order to protect the rights of others." *Id.*

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decided on the same day as the instant case. In the matter at bar, the Court of Appeals affirmed the District Court's finding that the *disciplinary* procedures at Walpole were controlling; but in *McLaughlin* v. *Hall, supra,* it held that *Wolff* required that the "development of specific procedural requirements beyond those enumerated in [*Wolff*] must be left in the first instance to the sound discretion of correction authorities." In a footnote to its *McLaughlin* opinion, the court noted that while it rejected imposing a specific constitutional rule requiring *in camera* examination it did suggest that in lieu of such *in camera* examination, where such would be inadvisable, the authorities "may well devise other ways of indicating on the record indicia of reliability and the steps taken to verify information." See 520 F.2d at 385, n. 4. While *McLaughlin* may not be directly inconsistent with *Fano*, it certainly would appear that the First Circuit applied a somewhat divergent analysis to the two cases, even though both opinions were released on the same day.

Moreover, as argued above, the functional difference between the disciplinary hearing when the question is centered on the truth of the charges, is far different from the specific question presented in a transfer case when the security of the institution is implicated. Even if reasonable doubt can be cast upon the informant information, the necessity for administrative action is not substantially altered. The evaluation of the credibility of informant information when the physical security of an institution is in question must always be made by correction officials. It is the situation noted by Judge Campbell where administrative reality must necessarily require the ability to transfer even on the basis of demonstrably inadequate information. In terms of analyzing the functional adequacy of the procedures afforded in such situations, it should be kept in mind that correction officials have no interest in acting on arbitrary or capricious information. Unless officials are willing to proceed only on rational grounds, then their action can only further erode whatever limited confidence inmate and custodian now repose in each other. To this extent, the interests of the state and the interests of the inmate are essentially congruent.

The state's concern is in the security of its institutions and the correction and reabilitation of those committed to its custody. This interest cannot be served by arbitrary or capricious behavior. The good faith of Massachusetts correction officials must be presumed, particularly when the situation facing them is a very sensitive balancing of the rights of inmate informants with those who the informants have identified as dangerous to institutional security. The state's interest, broadly put, is the proper functioning of its prison system with a goal toward the security of that system and the rehabilitation of those committed to its care. Cf. *Goss* v. *Lopez,* supra, at 591, (dissenting opinion of Mr. Justice Powell).

In the case at bar, petitioners have afforded every significant right required by due process, with the specific exception of those procedures which would compromise the safety and security of the informants. The application of an interest balancing test, which would weigh the rights of the plaintiffs to the procedures requested, against the weight of the state's interest—as well as the interest of the inmate informants—would clearly show that the process afforded was both functionally adequate and meaningful in the full sense of due process. The full procedures which are described in *Wolff* for disciplinary hearings are largely unsuitable for the types of decisions necessary to effect a transfer. The procedures followed by the petitioners in the hearings below recognized this. We contend that they were consistent in every respect with the holding in *Wolff* and with the rationale behind that holding. Surely, when a hearing cannot function so as to serve the purpose for which it is designed, it cannot be constitutionally mandated. If this court should determine that process is indeed due, then it should find that the Constitution is served by a notice to the inmate of the proposed action and an opportunity for that inmate to be heard in opposition to the action. Further procedures, and the details of such procedures, should be left to the good faith of correction officials and not inflexibly set into constitutional law.

Conclusion

The Fourteenth Amendment operates only to protect identifiable liberty or property interests. We argue that the Commonwealth of Massachusetts has created no such interest in the instant case. We further contend that an inmate has no inherent liberty interest in remaining in any one particular institution in the Commonwealth of Massa-

chusetts. If, indeed, it is the nature of the interest rather than the weight of the interest which is important, then an inmate must establish a legitimate claim of entitlement to the benefit asserted and the Court must specifically find that the liberty or property interest is within the meaning of the Fourteenth Amendment. Many federal courts, including the First Circuit Court of Appeals, have rested the question of whether or not procedures are due upon the "weight" of the interest asserted by the claimant. Such an analysis tends towards a subjective approach to due process, an approach which is inconsistent with sound constitutional analysis.

If "grievous loss" is to be a touchstone of due process, then "grievous loss" must be limited to clearly objective deprivations, such as loss of good time or placement in administrative segregation or tangible evidence of real harm. Constitutional analysis must exclude reference to speculative injuries which a transfer might encompass, such as "harsher living conditions" or "adjustment to a new environment". The petitioners do not suggest that these considerations are meaningless, merely that they assume the worst while, at the same time they are factors which are not subject to any measurable standard. It is important to recognize that while objective standards of fairness are a necessity in prison life, even the most stringent safeguards will not satisfy everyone. Neither the prison system nor the judicial system functions in this manner. Perceptions will vary according to the subject and there will be those who remain unconvinced of the fairness of any system so long as the ultimate control of their lives and destiny belongs to anyone other than themselves.

Prison officials deal with volatile and dangerous situations on a daily basis. They must be afforded the widest possible discretion consistent with the fundamental guaran-

tees of our Constitution. The decisions that correction officials must make often require a sensitive and delicate balancing of interests, rights, and desires. The duty petitioners owed to the inmate informants, as well as the other inmates confined at MCI, Norfolk, required that the procedures afforded the plaintiffs be limited to a notice of the proposed transfer and an opportunity to be heard in opposition to the transfer. The procedures followed by the petitioners were adequate, in the context of this case, to provide fundamental fairness to the plaintiffs. They were also required to insure that the physical safety of the inmate population and the security of the institution would be guaranteed.

For all of the reasons stated in this brief, the petitioners request that the judgment of the Court of Appeals for the First Circuit be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory References

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

MASSACHUSETTS GENERAL LAWS

CH. 30 A, § 5

§ 5. Regulations; Filing; Duty of State Secretary.

The regulations of each agency shall be filed with the state secretary under the requirements of section thirty-seven of chapter thirty. Upon receipt of a regulation prepared in accordance with any general or special law, the state secretary shall accept it for filing and endorse thereon the time and date of the filing. Such endorsement by the secretary shall be prima facie evidence of compliance with any regulation-making filing requirement imposed by law.

§ 37. Taking Effect of Certain Rules and Regulations; Filing and Indexing Thereof.

Notwithstanding any special or general law, every department, commission, board or official vested by law with the power to make and issue rules and regulations general in scope shall file an attested copy thereof, together with a citation of the law by authority of which the same purport to have been issued, and together with the dates of approval by other boards or agencies if required and any other information necessary to show compliance with statutory requirements relative to issuance of such regulations, with the state secretary, and such rules or regulations, whether or not they require the approval of the governor, the governor and council or other authority before taking effect, shall not take effect until so filed. A copy of such rules and regulations shall also be filed with the state librarian. The foregoing provision shall not apply to rules or regulations issued by commissions, boards or officials of towns, or to municipal ordinances or by-laws, or to the welfare compensation plan and rules and regulations established in accordance with the provisions of section forty-seven D of chapter thirty-one, or the rules or regulations affecting solely the internal management or discipline of a department, commission, board or office, nor to orders or decrees made in specific cases within the jurisdiction of a department, commission, board or official. The state secretary shall file and index all rules and regulations filed with him hereunder, noting and keeping available such references to preceding rules and regulations as may be necessary for certification purposes.

§ 38C. Superintendent of Institution to Report Commission of Felony to District Attorney.

Whenever the superintendent of a correctional institution of the commonwealth determines that a felony has been committed therein, he shall forthwith notify the district attorney for the county in which such institution is located. (1960, 807.)

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, *et al.*,

Petitioners,

v.

ARTHUR FANO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, *et al.*,

Petitioners,

v.

ARTHUR FANO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTIONS PRESENTED

I

Whether a prisoner who suffers a major adverse change in the conditions of his confinement as the result of transfer from a medium to a maximum security prison on the basis of allegations of misconduct is entitled to the protection of the Due Process Clause of the Fourteenth Amendment.

II

Whether the failure of prison officials to provide the prisoner with adequate notice of the charges of misconduct and with a summary of the evidence against him deprived the inmate of a meaningful opportunity to be heard prior to his transfer to more adverse conditions of confinement.

STATEMENT OF THE CASE

During a period of unrest at the Massachusetts Correctional Institution (hereinafter MCI) Norfolk, the respondents were summarily removed from the general population at that institution and were placed in a segregation unit. (App. 55, 56).[1] The respondents did not receive any written notice or hearing prior to being placed in segregation nor were they informed, either orally or in writing, of the reasons for their placement in this unit. (App. 56). On October 25, 1974, each inmate was given a copy of a disciplinary report which charged him in general terms with major violations of certain institutional rules and regulations. (App. 34-38,

[1]The factual record in this case is principally comprised of stipulations entered into by the parties in the United States District Court. Only one witness testified and his testimony has not been preserved for appeal. See *Fano v. Meachum*, (App. 131-138) 387 F.Supp. 664, 666 (D. Mass. 1975).

63).[2] The alleged offenses were also referred to the local district attorney for investigation and possible prosecution.[3] No disciplinary hearing was held on these charges, despite the requests of respondents' counsel (App. 56-57).[4] On November 4, 1974, each inmate was

[2]If the respondents had been provided with disciplinary hearings, the inmates would have been afforded the procedures for major violations required by Commissioner's Bulletin 72-1 (App. 114-115). These regulations, in effect since June 5, 1972, mandate specific procedural rights for inmates in order to provide "a speedy and fair adjudication of alleged wrong-doing." (App. 109). The procedures at such a hearing include written notice of the charges and a copy of the disciplinary report prior to the hearing; the opportunity to be represented by counsel or a law student; the opportunity to have the complaining officer present and to question him; the right to view any report considered by the board; the opportunity to present testimony or documentary evidence on his behalf; the right to confrontation; and the right to a written statement of reasons and findings based on reliable evidence.

According to these disciplinary regulations, once a finding of guilt has been made, the inmate's past record may be considered in deciding the appropriate sanction (App. 115), and transfer of the inmate is a permissible punishment (App. 117).

[3]In late November, petitioner Meachum was informed by the office of the District Attorney that his investigation "has not at this time revealed sufficient evidence against these subjects [including the respondents] to proceed against them criminally." (App. 56-57).

[4]The petitioners have taken the position that they were barred by the disciplinary regulations (App. 118) from holding disciplinary hearings to impose institutional sanctions when a case has been referred to the District Attorney for prosecution. Brief for Petitioners at 5, note 2; [hereinafter Pet. Br.] However, the disciplinary regulations indicate that a hearing may be held although a sanction shall not be imposed. Moreover, the Court of Appeals concluded that respondents' position, even if well-founded, could not "immunize what would otherwise be a due process violation." *Fano v. Meachum*, (App. 145).

served with a Notice of Classification Hearing (App. 58), after a request for a temporary restraining order had been sought in district court. These notices stated that respondents would receive classification hearings "in view of" certain information obtained from informant sources that linked respondents to the planning and execution of fires, possession of contraband and trafficking in drugs. (App. 39, 40, 64-67). This information was described in language that tracked the disciplinary reports. None of these notices apprised the inmate of the time or place of the alleged acts nor did the notices provide any but the most general information relating to the charge.

Classification hearings were subsequently held for each respondent within the next ten days. (App. 58). The Board opened each hearing by reading a prepared statement and then ordered the respondents and their representatives from the room. (App. 58). The Board then listened to the unsworn hearsay testimony of Superintendent Meachum of MCI-Norfolk. His testimony was based on information supplied to him by confidential informants (App. 58-59). After the evidence of the alleged offenses were presented in these closed sessions, the prisoner and his counsel were permitted to reenter the room. Each respondent was then informed that the informant information supplied by Meachum supported the allegations in the notices (App. 59).[5] No other evidence in support of the allegations of misconduct was presented at the hearing.

[5]In at least one case, the Classification Board stated that it had concluded that the information was reliable before affording the inmate any opportunity to be heard. (App. 59).

The inmates were not informed of any of the information, even in summary form, supporting the general allegations. None of the inmates were specifically informed of what they had allegedly planned to do nor were any of the respondents apprised of when or with whom they had engaged in the alleged activities. The inmates charged with possession of contraband were not even told what contraband they had allegedly possessed. Each inmate denied his participation in any of the general activity recited in the disciplinary charges or in the notices of the classification hearings. (App. 68-108).[6]

The Classification Board recommended transfer of all the respondents, with the exception of Royce, to maximum security institutions at Walpole or Bridgewater (App. 59-60). Respondents were not provided with a written statement of the Board's reasons for its decisions or of the evidence on which the Board relied (App. 60). They were only orally informed that the recommendations of the Board were based on the disclosed informant information (App. 60).

[6]Since the inmate could not respond to the charges, he tried to avert transfer by producing general character references or recommendations (App. 72, 74, 102); by guessing at the charges and asserting his lack of involvement (App. 69, 100); or by arguing that he had an excellent institutional record (App. 42-43, 45, 47, 49). However, the prisoners had no way of knowing whether any of this information would be relevant or useful to the Board in reaching its decision, nor could they know whether any of the information presented would even be considered by the Board. In fact, most, if not all, of this information was discounted by the Board. In fact, most, if not all, of this information was discounted by the Board which predicated its decisions solely on the testimony presented by Meachum. (App. 70-71, 75, 81-82, 100).

The Board then prepared a written report of its recommendations for the Commissioner to review. The respondents were not informed of the contents of this report. (App. 60). The recommendations of the Board to transfer five of the respondents to Walpole or Bridgewater were followed[7] (App. 61). Although respondent Royce did not appeal the Board's decision, the recommendation that he remain at Norfolk was reversed by the Commissioner. (App. 53, 61). Respondents were subsequently transferred[8] to Walpole and Bridgewater. Respondents were never provided with a written statement of the reasons for the Commissioner's decisions nor of the evidence the Commissioner relied on in making those decisions. (App. 61).

The respondents' transfers, and the bases thereof, were noted in each inmate's institutional file which is reviewed by the Furlough Board, the Parole Board, and other administrative agencies of the Department of Correction (App. 62) and may affect respondents' opportunities to obtain furloughs, to participate in work release and other correctional programs and, ultimately, to gain release on parole.

Respondents then sought relief, pursuant to 42 U.S.C. sec. 1983, in the United States District Court.

[7]The Commissioner decided to transfer respondent DeBrosky to Walpole rather than Bridgewater.

[8]The Commissioner has been vested with broad statutory authority to transfer inmates. M.G.L.A. Ch. 127, sec. 97 (1974 ed). This statute does not explicate the standards governing a transfer. Pursuant to this statute, the Commissioner has delegated authority to lower prison officials to transfer inmates as a disciplinary sanction for a "major violation" of institutional rules and regulations (App. 117).

The complaint, which was subsequently amended, alleged that the prison officials had violated the Constitution by placing respondents in segregation cells without prior notice and by transferring them to more adverse conditions of confinement in other institutions without adequate notice and hearings (App. 16). Respondents sought declaratory and injunctive relief as well as compensatory and punitive damages.

After reviewing the stipulated record,[9] the District Court found that the conditions of confinement at MCI-Walpole and MCI-Bridgewater, were substantially more adverse than those at MCI-Norfolk and, further, that these institutions had been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction. *Fano v. Meachum* (App. 135).[10] Since the District Court viewed the transfers as disciplinary in nature, the Court concluded that the defendants were required under *Wolff v. McDonnell*, 418 U.S. 539 (1974) to give inmates who were charged against them so that they could prepare a

[9]The Solicitor General alludes to an affidavit of Superintendent Meachum attesting to the Superintendent's view of the reliability and credibility of the informants as well as to his opinion of the danger to them from a more detailed summary of the evidence (App. 140-141), [*Brief For The United States As Amicus Curiae* at 9, note 10 (hereinafter S.G.Br.)] This affidavit was not part of the stipulated record considered by the District Court. The affidavit was submitted to the District Court only for purposes of the petitioners' Motion for Stay Pending Appeal; it was not offered to the District Court for purposes of the record at the District Court hearing nor did Superintendent Meachum ever testify on the matters contained in the affidavit.

[10]The District Court had previously noted its awareness of the conditions in these two institutions. *Daigle v. Hall*, 387 F. Supp. 652, 659 (D. Mass. 1975).

meaningful and intelligent defense (App. 136)[11] and notice of the hearing that, at the very least, provided the inmates with the time and place of the alleged offense. (App. 137). Since the petitioners had failed to follow constitutionally adequate procedures, the District Court ordered the prisoners returned to the general population at MCI-Norfolk.[12] The petitioners then

[11]The District Court noted that Institutional Order 4310.1 (App. 136) which was in effect at MCI Walpole, provided guidance as to the minimum requirements in the peculiar circumstances of the present case. This order provides, in pertinent part, the following:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve:
> (1) Subjecting the informant to a significant risk or harm or
> (2) A substantial risk to institutional security
> (3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record.
> (4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

Petitioners assert that the action of the District Judge in taking judicial notice of this regulation was improper under the Federal Rules of Evidence. [Pet.Br. at 3, note 1] The short answer to this contention is that the Federal Rules of Evidence did not go into effect until July 1, 1975, after the District Court's decision was issued. Moreover, if petitioners felt aggrieved by this action, they should have sought relief in the District Court after the issuance of the order, pursuant to Federal Rules of Civil Procedure 60(b), rather than raising this evidentiary point in this Court for the first time.

[12]The District Court also directed the Commissioner of Correction and the Superintendent of Norfolk to submit regulations providing inmates at Norfolk with rights to transfer hearings substantially in accordance with a prior decision of the Court and with the regulations mentioned in note 11 *supra*. *Fano v. Meachum*, (App. 138).

appealed to the United States Court of Appeals for the First Circuit.[13]

The Court of Appeals, in affirming the judgment of the District Court, viewed the case in a slightly different light than the lower court. The Court focused on two issues: (1) whether the Due Process Clause applies to the decision to transfer an inmate from medium to maximum security institutions within Massachusetts, *Fano v. Meachum*, (App. 146-147), and (2) if due process guarantees are applicable, what specific procedures were appropriate in the circumstances of the present case. (App. 150). With respect to the first issue, the Court did not attach any significance, as did the District Court, to the fact that the proceedings were for "classification" rather than "discipline." (App. 145, note 2). Instead, after a careful review of the substantial deprivations flowing from the prisoners' transfers, the Court concluded that "the inmate interests affected fall within the liberty protected by the Fourteenth Amendment." (App. 150).

Once having decided that the Due Process Clause was applicable, the Court of Appeals considered what procedures were appropriate under the circumstances. The Court determined that, in the instant case, this inquiry was restricted by two factors: (1) the inmates' objections to the hearing were limited to the lack of any summary of the evidence provided by confidential informants (App. 150);[14] and (2) the Walpole regula-

[13]After the District Court denied petitioners' Motion for a Stay Pending Appeal, a stay was granted by the United States Court of Appeals on January 23, 1975 (App. 142-143). The appeal to that Court was also expedited. The order of the District Court directing that the respondents be transferred back to MCI-Norfolk has been stayed since that date.

[14]The respondents had vigorously objected in their complaint and before the District Court to the inadequate notice as well. (App. 29). See also *Fano v. Meachum* (App. 134).

tion, cited by the District Court, reflected "that the release of a summary of informant provided information is not inconsistent with institutional requirements," and that, absent some suggestion that the rule was unworkable or unduly burdensome, prison officials could not deny similar procedures to inmates at a medium security institution. (App. 152).[15]

This Court subsequently granted the petition for a writ of certiorari on December 8, 1975.[16]

SUMMARY OF ARGUMENT

This case involves the extent to which an inmate is entitled to the protection of the Due Process Clause when he is transferred intrastate from a medium security institution to a maximum security institution on the basis of allegations of misconduct. The

[15]Finally, the Court affirmed the holding of the District Court that the notice of the hearing must "at the very least state the time and place of the alleged offense with reasonable accuracy." *Id.* at 380 (App. 152). The Court concluded that this requirement was not only mandated by *Wolff* but also that the notice would not provide the inmate with any information beyond the summary already required by the Court of Appeals decision (App. 152).

[16]The Solicitor General suggests that "[t]here is a substantial question whether this case is properly before the Court" since "[c]onstitutional challenges seeking injunctions against the state regulations of statewide applicability must be heard by district courts of three judges." S.G.Br. at 7, note 9. It is difficult to understand the basis of the *amicus'* contention since the prayer for relief in the Amended Verified Complaint (App. 31-32) did not request injunctive relief against the enforcement of *any* regulation, let alone a regulation of state-wide applicability. Furthermore, the District Court did not, *sua sponte*, enjoin any regulations (App. 137-138). Cf. *Pell v. Procunier*, 417 U.S. 817, at note 1 (1974); *Sands v. Wainwright*, 491 F.2d 417, (5th Cir., 1974), certiorari denied *sub nom Guajardo v. Estelle*, 416 U.S. 992 (1974).

respondents do not challenge the authority of prison officials to transfer prisoners.[17] Nor do the respondents assert that they have any constitutional right to remain at a particular prison throughout the term of their imprisonment.[18] However, respondents do contend that substantial liberty and property interests are implicated in intrastate transfers which involve an adverse change of the overall conditions of confinement and that the Due Process Clause is applicable to such transfers.

[17]This authority has been considered a matter appropriate for Congressional or state legislative authorization. See e.g., *Hillen v. Director of Social Service and Housing*, 455 F.2d 510 (9th Cir. 1972); *Hanvey v. Pinto*, 441 F.2d 1155 (3rd Cir. 1971); *Duncan v. Madigan*, 278 F.2d 695 (9th Cir. 1960) cert. denied, 366 U.S. 919 (1961). See also, *Gomes v. Travisono*, 490 F.2d 1209, 1212 at note 2 (1st Cir. 1973) vacated and remanded *sub nom, Travisono v. Gomes*, 418 U.S. 909 (1974), on reconsideration after remand, 510 F.2d 537 (1st Cir. 1974).

For the most part, the above cases were considered on *pro se* petitions without any extensive presentation, development or analysis of the issues involved. See also, *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974).

In Massachusetts, transfer authority has been vested by statute in the Commissioner of Correction. See M.G.L.A. Ch. 127, sec. 97 (1974 ed).

[18]For cases rejecting this argument, see e.g., *Gray v. Creamer*, 465 F.2d 179, 187 (3rd Cir. 1972); *Bundy v. Cannon*, 328 F.Supp. 165, 173 (D. Md. 1971). See also, *Gomes v. Travisono*, *supra*, 490 F.2d at 1212, note 3. However, as the Court of Appeals noted in *Gomes*, *id*, the force of these opinions has been vitiated by this Court's rejection of the principle "that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege'." *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Nonetheless, the right-privilege distinction continues to cloud analysis of prisoners' cases. See the dissenting opinion of Judge Campbell in *Fano v. Meachum* (App. 153).

I

Due process is a flexible concept which affords protection to all individuals from arbitrary deprivations of their liberty or property. Respondents, although prisoners, still have "limited liberty" protected by the Due Process Clause. The petitioners stipulated to a factual record which supported the finding of the District Court that the conditions at the maximum security prisons to which respondents were transferred were substantially more adverse than those at the medium security prison at Norfolk (App. 135). Furthermore, a notation was placed in each of the respondents' files which indicated that he had been transferred as the result of serious misconduct, including the planning and execution of fires, the possession of contraband such as weapons and the trafficking in drugs. This notation, which identifies respondents as "troublemakers" will have serious future consequences, for this information will be considered by correctional officials and the parole board in reaching critical decisions affecting the length and nature of respondents' incarceration. On the basis of a record of serious deprivations affecting all aspects of the respondents' confinement, the Court of Appeals properly recognized that the "inmate interests . . . fall within the liberty protected by the Fourteenth Amendment" (App. 150).

II

Respondents also have a legitimate claim of entitlement to the rights and benefits of incarceration at the medium security prison at Norfolk. Prison officials in

Massachusetts have created a corrections system containing institutions with divergent conditions of confinement in order to effectuate the explicit statutory goals of corrections in the state: rehabilitation and the reintegration of the offender into the community. The right to remain at a particular institution and to partake of the particular rehabilitative programs at that prison is dependent upon the inmate's conduct. Absent misbehavior, he will not be transferred to more restrictive conditions. The record in this case demonstrates that respondents' opportunity to participate in the programs at Norfolk was terminated on the basis of allegations of involvement in serious breaches of prison rules. Since Massachusetts has established a corrections system in which respondents could participate in various rehabilitative programs and since the transfer of respondents to a prison with fewer benefits and opportunities was the result of allegations of misconduct, the petitioners were required to recognize the respondents' legitimate claim of entitlement as a property interest protected by the Due Process Clause.

III

Wolff v. McDonnell, 418 U.S. 539 (1974) strikes a careful balance between the individual rights of prisoners and legitimate institutional goals in requiring prison officials to provide minimal guarantees of due process to inmates charged with serious misconduct. Petitioners initiated the disciplinary process in the present case and charged the respondents with major acts of misconduct. Hearings on these charges would have required the minimal *Wolff* procedural protections: notice, a hearing and a written statement. The

disciplinary process was abruptly discontinued, however, and respondents received classification notices which tracked the disciplinary charges. Respondents were, therefore, entitled to minimal due process at these transfer hearings, for these proceedings were no different from the ordinary disciplinary hearing where allegations of major misconduct are at issue and transfer may be imposed as a sanction (App. 117). To permit the petitioners to circumvent the procedural requirements of *Wolff* by labelling a proceeding a "transfer" hearing rather than a "disciplinary" hearing, when the two processes involve identical inquiries into allegations of serious misconduct, would invite wholesale repudiation of the *Wolff* strictures.

IV

Since the prisoners were deprived of liberty and property protected by the Fourteenth Amendment, they were entitled to hearings which met the minimal requirements of due process. In determining what specific processes are due, the Court must accommodate the legitimate correctional goals of prison officials and the substantial deprivations suffered by the respondents. The various justifications asserted by the prison officials can be given short shrift because they either have been accommodated in *Wolff* or lack any evidentiary support in the record of the proceedings below. Moreover, contrary to petitioners' and *amicus'* assertions, a hearing in the present circumstances would substantially further rehabilitative goals while not impeding any legitimate needs of correctional authorities. Therefore, petitioners have failed to offer any significant justifications for failing to provide respondents with the minimal requisites of *Wolff*

V

The notice provided the prisoners did not comply with the minimal demands of the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 534, 564 (1974). The notice was insufficient to inform the prisoners of the charges against them and to allow them to marshal the facts in their defense. *Id.* Absent proper notice, the hearings were meaningless, for the evidence of allegations of respondents' misconduct was presented outside the prisoners' presence, and the respondents were unable to present any defense to the charges. Thus, the procedures at respondents' hearings were ritualistic trappings for a "secret one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951). (Frankfurter, J., concurring.)

VI

Finally, the failure of the petitioners to provide respondents with a summary of the information was fundamentally unfair in the circumstances of this case. Since due process requires that prisoners be provided with a statement of the evidence relied on, the prison officials bear a heavy burden in limiting this fundamental right. Petitioners have not presented any reasons in the record for more restrictive procedures in the present circumstances, and, further, their own regulations demonstrate that providing a summary of informant information at the hearing is not inconsistent with legitimate institutional concerns. Petitioners cannot arbitrarily avoid minimal due process requirements without demonstrating any basis in the record for their actions.

ARGUMENT

I.

THE DUE PROCESS CLAUSE APPLIES TO INTRASTATE TRANSFERS OF PRISONERS WHICH RESULT IN A SIGNIFICANT ADVERSE CHANGE IN THE INMATES' OVERALL CONDITIONS OF CONFINEMENT ON THE BASIS OF ALLEGATIONS OF MISCONDUCT.

Petitioners and the Solicitor General assert that the issue of where a prisoner is located is a matter of discretion for prison officials raising no constitutional issues. This contention has a familiar ring, for prison authorities have often argued that their actions should be immune from judicial scrutiny and that prisoners are not entitled to constitutional protections. However, this Court has rejected these assertions as "untenable" and has recognized that "[t]ere is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974).[19] Among the constitutional rights afforded inmates is the protection of the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

[19]The Court in *Wolff v. McDonnell*, *supra* at 555, also noted that a prisoner "is not wholly stripped of constitutional protections when he is imprisoned for crime." See also, *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973); *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) cert. den. 325 U.S. 887 (1945).

A. A Prisoner Whose Conditions Of Confinement Are Adversely Changed As The Result of An Intrastate Transfer On The Basis Of Misconduct Has Liberty And Property Interests Within The Contemplation Of The Fourteenth Amendment.

The Fourteenth Amendment forbids the state from depriving any person of life, liberty or property without due process of law. The threshold inquiry for determining whether a hearing is constitutionally mandated in the instant case is to consider whether "the interest [asserted by the prisoner] is one within the contemplation of the 'liberty' or 'property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). This inquiry does not stop at the prison gate. *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Petitioners seek to limit this inquiry solely to a determination of whether Massachusetts has created a state interest or claim of entitlement "to remain in a particular institution."[20] However, this analysis drains the Due Process Clause of much of its content and obscures the important distinctions between the "liberty" and "property" protected by the

[20]Brief of the Petitioners at 17-18 [hereinafter Pet.Br.]; Brief of the United States As Amicus Curiae at 21-25 [hereinafter S.G.Br.].

Fourteenth Amendment.[21] Consequently, it is necessary to consider these separate interests[22] in order to fully

[21]Petitioners' and *amicus'* argument reflects a misunderstanding of the distinctions between liberty and property and of prior decisions of this Court. Liberty interests are not creatures of state law, like property interests. *Board of Regents v. Roth*, 408 U.S. 507, 564, 578 (1972). However, a person's liberty is still protected by the Due Process Clause "*even when* the liberty itself is a statutory creation of the State." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). (emphasis supplied). The above language in *Wolff* has been interpreted to mean that the prisoner's liberty interest in the instant case must flow from a "statutory right . . . to be at one institution rather than another." *Fano v. Meachum*, (App. 153) (Campbell, J., dissenting). This analytical error results from a misreading of *Wolff*. The guidance that a Court obtains from state law for the consideration of property rights is, for the most part, irrelevant to interests of liberty which are not conditioned upon state-created rights. *Wolff* only recognized that, regardless of the source of liberty, the individual's liberty interest is still protected by the Due Process Clause. The interests identified in *Wolff*, therefore, could have been accurately described as either liberty or property interests. Thus, the analysis of liberty and property interests paralleled each other in that particular case. That does not mean that a similar analysis is appropriate in every other prison case where liberty and property interests are implicated. Instead, there is a separate and identifiable constellation of rights and opportunities constituting the interest of liberty which do not hang on the slender reed of state-created rights. By not recognizing this distinction, petitioners' argument has the anachronistic tone of the "right-privilege" distinction, and resurrects conclusory terms, rather than analysis, to define the parameters of constitutional rights. See e.g., *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*, 402 U.S. 535, 539 (1971). See also, Van Alstyne, *The Demise of the Right-Privilege Dichotomy in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[22]Regardless of the precise line of demarcation between liberty and property, *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972), it is clear that these two interests have a different content. Cf. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (discussion of property interest) with *Goss v. Lopez*, *id.* at 574-575 (discussion of liberty interest). See also, *Board of Regents v. Roth*, 408 U.S. 564, 571-578 (1972).

understand how they are both implicated in a decision which results in the transfer of an individual from a medium to a maximum security institution.

1. The Respondents Were Deprived of Liberty Protected By The Fourteenth Amendment As a Result of Their Transfer to More Adverse Conditions of Confinement On The Basis of Misconduct.

The Due Process Clause forbids arbitrary deprivations of liberty. *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). The analysis of liberty interests by this Court has reflected a realistic appreciation that constitutional principles are not static or inflexible. Consequently, the Court has recognized that a continuum of liberty interests is protected by the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972).[23] The liberty of free men[24] may be distinguishable from the "conditional liberty" of parolees[25] or probationers.[26] Prisoners also possess limited liberty interests. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S. 396, 418 (1974); *Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971). Finally, at the outer reaches of this continuum, there may be interests which are so insubstantial or

[23]As Justice Harlan once noted:

> "(Liberty) is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[24]See e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This liberty is, of course, not absolute but may be subject to reasonable restrictions.

[25]*Morrissey v. Brewer*, 408 U.S. 471 (1972).

[26]*Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

insignificant that their deprivation will be tolerated, no matter how arbitrarily state officials choose to act. *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 573-575 (1972); *Wolff v. McDonnell*, *supra*, 418 U.S. at 571-572 at note 19 (1974).[27]

a. Liberty Interest in Conditions of Confinement

The deprivation of liberty after adjudication of guilt and incarceration is partial, not total. *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Because liberty is so limited in "total institutions",[28] the Court has been particularly sensitive to the additional restrictions upon a prisoner which are imposed by the state. Therefore, the Due Process Clause requires prison

[27]In contrast to this flexible approach to liberty, the petitioners and the Solicitor General would have this Court resurrect a static notion of liberty interests which depends solely on whether one is in or out of prison. However, this position ignores the decisions in *Morrissey* and *Wolff*, which indicate that "liberty" and "custody" cannot be equated.

Petitioners' analysis of due process also depends ultimately on a consideration of the status of the individual rather than upon an evaluation of the nature of his interest. However, status is irrelevant to whether there is a liberty interest, although it may be a factor in determining what process is due. Cf. *Wolff v. McDonnell*, *supra*, 418 U.S. at 555-556. Moreover, status is usually associated with determining whether there is a property interest, for a person's status may condition the reasonableness of his expectations in property. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[28]See generally, E. Goffman, *Asylums* 13-15 (Anchor ed. 1961).

See also, G. Sykes, *The Society of Captives* (Princeton University Press, 1972 ed.).

officials to afford minimal procedural protections to a prisoner prior to deprivation of good time or a major adverse change in the conditions of confinement as a result of misconduct. *Wolff v. McDonnell*, 418 U.S. 539, 571-572 at note 19 (1974); *id* at 581, note 1 (Marshall, J., dissenting in part); *id* at 594-595 (Douglas, J., dissenting in part).[29] Also, the Court has recognized that a prisoner's liberty includes the right to uncensored correspondence, which, absent a hearing, cannot be impeded. *Procunier v. Martinez*, 416 U.S. 396, 418 (1974). Similarly, an increase in restraints upon movement, a more restrictive custody level, additional controls or security, fewer educational or rehabilitative programs or interference with other activities can sharply affect the inmate's liberty within the "closed, tightly controlled" prison environment. *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974).[30]

[29]All nine Justices agreed in *Wolff* that a prisoner's liberty interest was implicated by a major adverse change in the conditions of confinement on the basis of misconduct. Lower federal courts have reached the same conclusion about the *Wolff* decision. See e.g., *Clonce v. Richardson*, 379 F. Supp. 338, 349 at note 2 (W.D. Mo. 1974).

[30]Lower federal courts have similarly recognized that the extent to which a decision of prison officials implicates the liberty interest of a prisoner turns on the particular environment of a "total institution."

As the Court of Appeals for the Ninth Circuit noted:

> Any deprivation of the small store of "privileges" accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a free setting, as anyone can attest who has been a student in a strict boarding school, a sailor aboard ship, a combat soldier, or a prisoner in time of war or peace . . . Grievousness of the loss depends upon the nature and circumstances and makeup of the prisoner who suffers the loss. *Clutchette v. Procunier*, 497 F. 2d 809 (9th Cir. 1974) (Opinion on rehearing, 510 F. 2d 613, 615 (9th Cir. 1974).

(continued)

The record in this case demonstrates that the transfers of respondents had a substantial adverse effect on their limited liberty. The District Court took judicial notice of the fact that the conditions of confinement at Norfolk had been deliberately differentiated from those at Walpole and Bridgewater (App. 135). MCI, Walpole and MCI, Bridgewater are both maximum security institutions where the inmate is subject to stricter security measures and controls upon his daily life than at the medium security prison, MCI, Norfolk (App. 61-62).[31] There is also fewer rehabilitative opportunities available at these institutions than at MCI, Norfolk. For example, MCI, Norfolk offers inmates training in a wide variety of vocations, provides educational opportunities

(footnote continued from preceding page)

Similarly, the Court of Appeals for the First Circuit has stated:

> In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations, and some modicum of privacy, it is likely that any marked change of status which forecloses such liberties will be perceived and felt as a grievous loss. *Palmigiano v. Baxter*, 487 F. 2d 1280, 1284 (1st Cir. 1973).

See also, *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 717 (7th Cir. 1973).

Petitioners and the Solicitor General also argue that this inquiry should be limited to a consideration of whether the prisoner has a legitimate claim of entitlement to incarceration in a particular prison. This argument suffers from the same defects noted above, *supra*, note 21. The prisoner does not have to invoke an independent source for his liberty interest.

[31] E. Powers, *The Basic Structure of the Administration of Justice in Massachusetts* 210-214 (6th ed. 1973). This book has been filed in the Office of the Clerk.

through classroom instruction and, of most importance, inmates at Norfolk may participate in work-release programs which facilitate their reintegration into the community (App. 62).[32] These opportunities are curtailed at Walpole and Bridgewater (App. 62). Finally, furloughs, which are essential in enabling the prisoner to maintain community ties, are more difficult to obtain at Walpole than at Norfolk (App. 62).

Furthermore, the deprivations imposed upon respondents as a consequence of their transfers constituted a "grievous loss." See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). The Court of Appeals recognized that the deprivations to respondents were "serious" and "certain" (App. 148) and accorded the proper deference of a reviewing court to the factual findings of the district judge.[33] The stipulated record was replete with specific instances of the abrupt, adverse changes in the conditions of respondents' confinement resulting from these transfers; including the "disadvantages from the breaking off of established programs, both educational and rehabilitative, and [the] orientation to a new setting, programs, rules and companions." *Gomes v. Travisono*, 409 F.2d at 1213 (App. 149). In the present case, all of the respondents suffered these serious deprivations. Hathaway was divested of his laundry

[32] *Id.* at 213.

[33] See Federal Rules of Civil Procedure 52(a) (1975 ed.). The District Court had entered a specific finding of fact "that the conditions of confinement at MCI, Walpole and MCI, Bridgewater are substantially more adverse than they are at MCI, Norfolk" (App. 135).

business, a source of livelihood within the prison, and lost his opportunity to participate in group therapy (App. 98-100); Dussault lost his job as a plumber and his avocation (App. 68-70); DeBrosky's involvement with a paint crew and his active participation in an educational program were terminated (App. 94); and Royce's supportive counselling relationships with the staff at Norfolk were disrupted (App. 104).[34] Since rehabilitation is the principal purpose of confinement in Massachusetts, M.G.L.A. Ch. 124, sec. 1(e) (1974 ed.),[35] disruption or interference with these activities must be viewed as a substantial barrier to the prisoner's ability to improve himself and partake of additional opportunities. Cf. *Cardaropoli v. Norton*, 523 F.2d 990, 995 at note 11 (2d Cir. 1975); *Catalano v. United States*, 383 F.Supp. 346, 350-351 (D.Conn. 1974).

[34]Petitioners and the Solicitor General repeatedly suggest that the Court of Appeals erroneously viewed the weight of the respondents' interest rather than the nature of it. However, the petitioners and *amicus* ignore the analytical underpinnings of the Court of Appeals decision. The interests asserted by the inmates in this case were readily identifiable as implicating their liberty; the only issue was whether the deprivations were substantial enough to be protected by the Fourteenth Amendment. The careful analysis by the Court of Appeals of the significance of the deprivations to the respondents is consistent with the approach in this Court's prior decisions. See e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (prisoner's interest must have real substance). See also, *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

[35]It is clear that the *nature* of respondents' interest affected as a result of these deprivations is not dependent on whether these losses are considered rights or privileges. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). See also, note 21, *supra*.

Therefore, the transfer of respondents on the basis of allegations of misconduct from the relaxed, rehabilitative atmosphere of Norfolk to the rigid, restrictive environments of maximum security institutions had a traumatic affect on the prisoners' lives[36] and on the residuum of their protected liberties.[37]

[36]Although the Court of Appeals considered geography irrelevant in the present case (App. 147-148), many intrastate transfers have serious geographical consequences. See *United States ex rel. Haymes v. Montanye*, 505 F.2d 977 (2d Cir. 1974) cert. granted 422 U.S. 1055 (1975) (several hundred miles); *Stone v. Egeler*, 377 F.Supp. 155 (W.D. Mich. 1973) aff'd. 506 F.2d 287 (6th Cir. 1974) (420 miles).

[37]In the face of these serious deprivations, the Solicitor General contends that the liberty interests in *Wolff* were only recognized because "the State had bound itself by regulations and a course of practice . . . to impose solitary confinement [or to forfeit good time] *only on account of misconduct.*" [S.G. Br. at 20-22]. (emphasis supplied). Thus he argues that since neither Massachusetts nor the federal government has similarly bound itself to transfer a prisoner only because of misbehavior, there is no protected liberty interest. The assumption of this argument is that a statute or regulation must create a mutual understanding between prisoners and prison officials that good time will not be taken away nor solitary confinement imposed except upon allegations of misconduct. Even if this argument is relevant to the analysis of respondents' property interest, it reflects a serious misunderstanding of the nature of the liberty interest. See note 21, *supra*. A person's liberty interest does not turn on the perceived seriousness of the behavior which triggers its deprivation; it depends upon the nature and seriousness of the deprivations imposed. A prisoner's liberty interest should be no less implicated if good time were forfeited or if solitary confinement were imposed after an intrastate transfer. Conversely, an inmate's liberty might not be implicated if the sanction for serious misconduct was a brief cessation of lesser privileges. The fact that Nebraska reserved forfeiture of good time or solitary confinement for violations a major misconduct does not define the substance or content of an inmate's liberty; it only serves to further substantiate the compelling need for a hearing to ensure a reliable determination of whether the charged behavior has occurred. Cf. *In re Gault*, 387 U.S. 1, 21 (1967); *Robbins v. Kleindienst*, 383 F.Supp. 239, 248 (D.D.C. 1974).

b. Liberty Interest in Institutional Reputation.

The stipulation reflected that the respondents were not merely transferred to more adverse conditions but also that they were identified as troublemakers in their institutional files (App. 62).

An inmate, like any other person in our society, has a cognizable liberty interest in avoiding the adverse consequences which flow from an arbitrary designation or classification. The right to challenge a "stigma" or "badge of disgrace" does not turn on the status or maturity of the individual, for an alleged alcoholic, *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), or a school child in his formative years, *Goss v. Lopez*, 419 U.S. 565, 574 (1975) is as entitled to the protections of the due process clause as any other citizen of our country. Nor is the prisoner any less protected because he is incarcerated, since this liberty interest attaches to all individuals, regardless of the power of the State to deal with a particular activity or endeavor. See e.g., *Wisconsin v. Constantineau, supra*, 400 U.S. at 436 (alcoholic beverages); *Goss v. Lopez*, 449 U.S. 565, 574 (1975) (elementary schools); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (state colleges and universities).

This liberty interest is substantially affected by the notation in respondents' files that they were transferred from a medium to maximum security institution on the basis of allegations of misconduct. The prisoner's identity within the prison is embodied in his institutional file. Cohen, *The Discovery of Prison Reform*, 21

Buffalo Law Review 855, 879 (1972).[38] His progress throughout the correctional system, the severity and duration of his prison experience, his custody level[39] and parole[40] are too closely linked to his institutional

[38]This identification results, in large part, from the integration of the inmate into the correctional system. E. Goffman, *Asylums* 18-19 (Anchor ed. 1961). When a convicted person first enters prison, he is evaluated and classified at a certain custody level. Sirico, *Prisoner Classification and Administrative Decisionmaking*, 50 Texas L. Review 1229, 1230-1235 (1972) (Study of Federal Correctional Institution at Texarkana, Texas). Given the nature of the prison community, this file subsequently becomes a repository of information about all aspects of the inmate's behavior. *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

[39]See generally, Gifis, *Nature of Decisionmkaing in a Prison Community*, 1974 Wisconsin Law Review 349 (Study of Massachusetts Correctional Institution, Concord). The file on the prisoner follows the prisoner through his term of incarceration and affects "his future [within the correctional system] with unwarranted authority," Sirico, *supra*, note 38 at 1231. The pressures and demands upon prison officials and employees in the day to day administration of a prison system almost always compel them to reach immediate decisions, affecting substantial interests of prisoners, on the basis of this file. See D. Glaser, *The Effectiveness of a Prison and Parole System* 132 (Abridged edition, 1969); Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal of Criminal Law 117, 134 (1974); Sirico, *Prisoner Classification and Administrative Decisionmaking*, 50 Texas L. Rev. 1229, 1240-1241 (1972); Bergeson and Hoerger, *Judicial Misconceptions and the Hidden Agenda in Prisoners' Rights Litigation*, 14 Santa Clara L. Rev. 747, 766, note 53 (1974).

[40]Decisions on parole are also based on hurried assessments of an inmate's file. See e.g., *Report on New York Parole: A Summary*, 11 Criminal Law Bulletin 273, 285 (1975); Foote, "The Sentencing Function" 17, 25, reported in Annual Chief Justice Earl Warren Conference on Advocacy in the United States (American Trial Lawyers Foundation, 1972). Cohen, *The Discovery of Prison Reform*, 21 Buffalo Law Review, 855, 880 (1972); President's Commission on Law Enforcement and the

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file to permit the negative implications arising from transfers to more adverse conditions of confinement on the basis of allegations of serious misconduct to remain unchallenged throughout his term of confinement. Moreover, this adverse designation cannot be mitigated or removed by virtue of the inmate's subsequent conduct, no matter how exemplary. *Cardaropoli v. Norton*, 523 F.2d 990, 995 at note 11 (2d Cir. 1975); *Catalano v. United States*, 383 F.Supp. 346, 350 (D. Conn. 1974). If this stigma has been attached without a sufficient basis, the prisoner may, in effect, be punished anew each time his record is reviewed. See *Gomes v. Travisono*, 490 F.2d 1209, 1213 (1st Cir. 1973) vac. and remanded, 418 U.S. 909 (1974), opinion on reconsideration after remand, 510 F.2d 537 (1974). Cf. *Burgett v. Texas*, 389 U.S. 109, 115 (1967). See also, *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970). Consequently, the interference with respondents' rehabilitation and eventual release is substantial, for it would be unrealistic to assume that the Parole Board[41]

(footnote continued from preceding page)

Administration of Justice: Corrections 63 (1967). See the description of the North Carolina Parole process in the ***Brief for the United States as Amicus Curiae in Weinstein v. Bradford***, No. 74-1287 at 6-7 for an illustration of the Parole Board's dependence on an inmate's institutional file.

[41]The Solicitor General contends that the consideration of illegal transfers by the Parole Board in the future is irrelevant to the existence of a cognizable liberty interest because respondents have no more than a "unilateral" expectation of parole. Moreover, he argues that, even if the due process clause applies to the parole release process, the prisoner could be adequately protected by a hearing on the transfer decision before the Parole Board. Finally, *amicus* argues that any adverse consequences of the transfer can be avoided by expunging the record of the transfer from the files before the Parole Board.

These arguments again reflect a failure to distinguish between liberty and property interests, for this Court's prior cases did not require a showing of a vested right or interest to implicate the

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and other correction officials, is assessing the respondents' suitability for release upon parole or work-release or for participation in other rehabilitative programs, will ignore the fact that respondents were transferred from Norfolk for setting fires, possessing weapons and trafficking in contraband.

The transfers also seriously damage the respondents' standing and associations in the highly disciplined, authoritarian life of the prison community. Cf. *Goss v. Lopez*, 419 U.S. 565, 575 (1975). At the transferee institution, the respondents will undoubtedly be viewed critically by prison officials and employees as well as by inmates. Prison officials will ordinarily perceive the new inmate as an adjustment problem or "troublemaker"

(footnote continued from preceding page)

"liberty" interest in one's reputation, not to a property interest. For example, in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), the Court did not require a showing that the respondent had a vested interest in buying liquor in upholding the individual's right to challenge the "badge of infamy" in that case.

Second, *Amicus* ignores the nature of parole board decision-making and the considerable pressures on the Parole Board. It is wholly impractical to conclude that a Parole Board will review prison transfers, in addition to the myriad other factors it considers, in making a parole decision. Moreover, even if the Board did consider the transfer, the prison inmate would be called upon to discuss an event which might have occurred some time in the past, and the prisoner would have slight chance of rebutting the adverse inferences flowing from a transfer based on allegations of misconduct. *United States ex rel. Haymes v. Montanye*, 505 F.2d 977, 982 (2d Cir. 1974) cert. granted 422 U.S. 1055 (1975). Cf. *Peyton v. Rowe*, 391 U.S. 54, 62 (1968).

Finally, expungement of the notation of a transfer would be inconsequential if the inmate's file reflected, without any explanation, his presence in another, more secure institution. Indeed, such unexplained entries in a record would increase, rather than minimize, the attention directed to the transfer.

who warrants close scrutiny and rigid controls.[42] Difficulties of orientation of the most fundamental sort could result for the alleged "troublemaker" in the new prison since "labels generally influence the way in which correctional employees view and deal with an inmate on a day to day basis."[43] Also, fellow prisoners are frequently hostile to transferees, possibly because they view them as "stool pigeons" who have been transferred to protective custody reasons.[44]

In an effort to minimize the adverse consequences to respondents' reputations, the petitioners contend that the criminal sentence is the stigma,[45] and the additional

[42]See *Attica:* The Official Report of the New York State Special Commission on Attica, 121, 133 (Bantam ed. 1972) [hereinafter *Attica*].

[43]Sirico, *supra* at note 38, 1232. See *Attica*, 133.

[44]See the careful findings of the district court in *Gomes v. Travisono*, 353 F.Supp. 457, 462 (D.R.I. 1972). One observer of the prison community noted that the epithet of "stool pigeon" is the worst possible "badge of infamy" for the prisoner in his community. Sykes, *supra* note 28 at 87-90. Cf. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Board of Regents v. Roth*, 408 U.S. at 565, 573 (1972).

[45]There is little doubt that a criminal conviction imposes a stigma and hardship upon the inmate which often results in indelible damage to his reputation in the outside world. Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vanderbilt Law Review No. 5 (May, 1970). Such deprivations, however harsh, are tolerated, not because the person is labelled a "criminal" but because he was afforded due process protections prior to the deprivation of his liberty. Similarly, a prisoner is afforded the protection of various constitutional provisions, including the guarantee of due process of law, regardless of the offensiveness of his original criminal conduct. *Wolff v. McDonnell*, *supra*, 418 U.S. 539, 555-556 (1974).

characterization of an inmate as a troublemaker is of little consequence. [Pet. Br. at 19, note 7.] However, reputations, like any other liberty interests and constitutional rights of the prisoners, are not left behind at the prison gates, *Wolff v. McDonnell*, 418 U.S. 539 (1974). See also, *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J. concurring). The necessity for restriction of the exercise of a prisoner's rights flows, not from a lack of sensitivity to the dignity of the prisoner, but from a need to accommodate legitimate penal objectives. However, there is no legitimate penal objective which justifies the imposition of an additional "badge of infamy" upon an inmate in a fashion that will affect the nature, severity and, perhaps length of his entire period of incarceration. The chances of good faith error, misjudgment, or official caprice are all too present to allow such state action to be undertaken without due process safeguards. Indeed, the particular circumstances of prisoners should compel the Court to be more vigilant in ensuring an adequate opportunity to challenge disparagements of their character. Precisely because of their conviction and sentence, prisoners have a substantial interest in restoring their good name, especially in the face of public accusations of the State that they continue to engage in anti-social conduct within the correctional environment. The "slave of the State" doctrine,[46] which this argument of petitioners recalls, should remain a discarded vestige of a former era and not become a contemporary reality.

[46]*Ruffin v. Commonwealth*, 62 Va. (21 Grath) 790, 794-796 (1871).

In summary, respondents have suffered immediate, substantial and indeterminate adverse changes[47] in the scope and quality of their conditions of confinement.[48] These changes deprive them of the "liberty" protected by the Due Process Clause and require the application of minimal procedural protections prior to their transfers.

[47]Petitoners and *amicus* substantially rely on *Board of Regents v. Roth*, 408 U.S. 564 (1972) to suggest that respondents' liberty interest was not implicated in their transfers. However, the vast differences between the present situation and that in *Roth* are more obvious than the similarities. *Roth* did not consider at all the direct, immediate and adverse restraints upon bodily movement which the respondents suffered and which remain at the core of liberty. Also, the Court specifically noted in *Roth* that the State did not make any charge of misconduct against the teachers; the opposite is true on the record before this Court since the transfers directly put at issue the respondents' reputation and character. Finally, there was no evidence in *Roth* that the State limited *Roth*'s options for alternative opportunities. In contrast to the sparse record in *Roth*, the petitioners' stipulation acknowledges that respondents' rehabilitative program involvement will be affected by the notation in their file. See also, *Cardaropoli v. Norton*, 523 F.2d 990, 995, note 11 (2d Cir. 1975). Therefore, *Roth* highlights rather than diminishes the nature and extent of respondents' deprivations of liberty stemming from the transfers.

[48]Lower courts have uniformly recognized, after careful and considered analysis of various factual patterns, that similar consequences of a transfer require the application of the Due Process Clause. *Newkirk v. Butler*, 364 F.Supp. 497, 503 (S.D.N.Y. 1973) aff'd 499 F.2d 1214 (2d Cir. 1974) vac. and remanded with instructions to dismiss as moot, 422 U.S. 395 (1975); *Montanye v. Haymes*, 505 F.2d 977 (2d Cir. 1974) cert. granted 422 U.S. 1055 (1975); *Carroll v. Sielaff*, 514 F.2d 415 (7th Cir. 1975); *Stone v. Egeler*, 377 F.Supp. 115 (W.D. Mich. 1973) aff'd 506 F.2d 287 (6th Cir. 1974); *White v. Gillman*, 360 F.Supp. 64 (S.D. Iowa 1973); *Aikens v. Lash*, 371 F.Supp. 482 (N.D. Ind. 1974); *Walker v. Hughes*, 386 F.Supp. 32 vacating 375 F.Supp. 708 (E.D. Mich. 1974); *Robbins v. Kleindienst*, 383

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2. The Respondents Possess A Legitimate Claim of Entitlement To The Rights And Benefits Attached to Confinement At MCI, Norfolk Since Massachusetts Has Organized Its Prisons To Provide Graduated Conditions of Confinement On The Basis of Conduct.[49]

The scope of property, like that of liberty, is not constricted by rigid, formalistic definitions. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). Instead, the procedural protection of property "is a safeguard of the security of interest that a person has already acquired in specific benefits." *Board of Regents v. Roth, supra*, 408 U.S. at 576-577; *Goss v. Lopez, supra*, 419 U.S. at 573. These interests are "not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state

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F.Supp. 239 (D.D.C. 1974); *Clonce v. Richardson*, 379 F.Supp. 338 (W.D. Mo. 1974). See also, National Advisory Committee on Criminal Justice Standards and Goals, Corrections, Standard 2.13 at 54-55 (1973) where an expert panel of individuals involved in corrections recognized that a hearing is necessary because "decisions [involving changes of custody levels] can have a critical effect on the offender's degree of liberty, access to correctional services, basic conditions of existence within a correctional system, and eligibility for release." See also, Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal of Criminal Law 117, 159-163 (1974); Millemann and Millemann, *The Prisoner's Rights to Staty Where He Is: State and Federal Compacts Run Afoul of Constitutional Due Process*, 3 Cap. U. L. Rev. 223 (1974); Note, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 Va. L. Rev. 333 (1974).

[49]The Court of Appeals did not have to find that the transfer of the respondents affected their property interest protected by the Fourteenth Amendment since the majority recognized that respondents' liberty interest was implicated in their transfer.

law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis supplied); *Goss v. Lopez*, 419 U.S. 565, 572-573 (1975). Such understandings do not necessarily have to flow from sources of positive law, like statutes or administrative regulations, for "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972).

To properly evaluate respondents' property interests, it is necessary to review briefly the complex interplay of statutes and administrative practice which underlies the Massachusetts correctional system.

Massachusetts statutes explicitly emphasize the rehabilitation of the offender and his reintegration into the community as the principal goals of corrections in the state. These statutes specifically require the Commissioner of Corrections "to establish, maintain and administer programs of rehaiblitation [for prisoners] . . . designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the Commonwealth." M.G.L.A. Ch. 124, sec. 1(e) (1974 ed) and "to establish a system of classification for [prisoners] the purpose of developing a rehabilitation program for each such person." M.G.L.A. Ch. 124, sec. 1(f) (1974 ed). See also, M.G.L.A. Ch. 127, sec. 48 (1974 ed) (establishing work-release). To effectuate this legislative purpose, the Department of Correction has established graduated conditions of confinement at the state prisons within Massachusetts (App. 135), and incarceration in a particular prison results in the inmate's acquisition of various rights and benefits. These may include a range of opportunities, including work-release[50] and educational programs, increased availability of furloughs and eligibility for other rehabilitative programs (App. 62).[51] The "bundle" of rights and benefits available to a prisoner varies depending upon where he is incarcerated.[52]

Furthermore, the inmate's level of custody in Massachusetts and opportunities for program involvement are related to his conduct within the prison system.[53] Transfer to lower custody status, with the concomitant increase in benefits and opportunities, is predicated upon the inmate's "capacity to take on greater responsibility . . . giving him more freedom, so that at release the transition from life in a correctional

[50]Educational and work-release programs in Massachusetts were established by M.G.L.A. Ch. 127, secs. 48 and 49 (1974 ed). For participation in these rehabilitative programs, the inmate must "demonstrate that he is responsible and deserving of these opportunities." M.G.L.A. Ch. 127, sec. 49A (1974 ed).

[51]See pages 21-22, *supra*.

[52]It is irrelevant, for purposes of the effect on respondents' property interest, that Massachusetts did not have to create a corrections system with graduated conditions of confinement. *Fano v. Meachum*, (App. 150); *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

[53]A former Acting Commissioner of Correction described the philosophy of the Massachusetts Department of Correction in the following terms:

> The classification process and the range of correctional programs are meant to provide opportunities for change . . . As the inmate demonstrates his capacity to take on greater responsibility, the controls of his correctional environment should be relaxed, giving him more freedom, so that at release the transition from life in a correctional facility to life on the street will be a relatively smooth one.

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facility to life on the street will be a relatively smooth one."[54] Within the correctional system, inmates thus have the right to be treated "with the kindness which their obedience, industry and good conduct merit." M.G.L.A. Ch. 127, sec. 32 (1974 ed).

Therefore, an inmate in Massachusetts is entitled to progress through a series of reduced controls and increased program opportunities as long as he is not involved in acts of misconduct which demonstrate his inability to remain at that custody level. See also, *Daigle v. Hall*, 387 F.Supp. 652, 659 (D. Mass. 1975). Conversely, if the prisoner's "obedience, industry and good conduct" do not merit confinement in a particular institution, he may be transferred and lose the rights

(footnote continued from preceding page)
Congress (First Session) Part V: *Prisons, Prison Reform and Prisoners' Rights*, Massachusetts (December 18, 1971). Thus, the prison system in the Commonwealth reflects a system of gradual relaxation of controls and custody as an inmate progresses in behavior.

The Solicitor General acknowledges that a similar situation prevails in the federal system [S.G. Br. at 3, note 3]. See Norman A. Carlson, *The Federal Prison System: Forty-Five Years of Change*, 39 Federal Probation 37, 38 (June, 1975), where the Director of the Federal Bureau of Prisons describes the federal system as follows:

> A correctional continuum emerged, designed to give inmates an opportunity to improve their chance for post-release success while making gradual transition from a life of confinement to the freedom of society.

[54]See *note* 53, *supra*.

and benefits provided at that prison.[55] Thus, a claim of entitlement has evolved in Massachusetts from this interrelationship of state law and administrative practice, upon which prisoners legitimately can rely when they move from one prison to another.[56] Such an arrangement allows state inmates to participate in the rehabilitative programs at a particular institution and to

[55]Petitioners appear to concede as much when they state:

> Any inmate confined within the Massachusetts correctional system is subject to transfer, no matter how exemplary his conduct at an institution. As a matter of practice, of course, this rarely occurs . . . [Pet. Br. at 22].

See also, E. Powers, *supra*, note 31:

> The courts do not commit men to Norfolk. Selected inmates sentenced to Walpole or Concord are transferred there where most of them serve out their terms, while a few, *found not suitable for a medium security institution, are returned to their original institutions. Id.* at 211. (emphasis supplied.)

[56]Consequently, the instant circumstances find their analogue in *Perry v. Sindermann*, 408 U.S. 593 (1972) rather than in *Board of Regents v. Roth*, 408 U.S. 564 (1972), upon which the petitioners rely. In the latter case, the notice of Roth's faculty appointment explicitly provided for the specific termination date of his employment. *Board of Regents v. Roth, supra*, 408 U.S. at 566. In *Perry*, however, the asserted property interest was an understanding shared by faculty and administration of the school's tenure policy. *Perry v. Sindermann, supra*, 408 U.S. at 599-600. The respondents contend that a similar understanding has developed in Massachusetts as a result of the emphasis on rehabilitation and the establishment of graduated conditions of confinement predicated on the behavior of the prisoner.

partake of the rights and benefits at that prison, absent serious misconduct on their part.[57]

The record confirms the nature of respondents' property interest in the instant case. Petitioners terminated the prisoners' participation in rehabilitative programs at Norfolk and limited their opportunities for such statutorily and administratively created programs by transferring respondents to Walpole. In making these determinations on the basis of allegations of respondents' misbehavior, petitioners concluded that the prisoners' conduct was "prohibitive to rehabilitative

[57]Petitioners [Pet. Br. at 21] and the *amicus* [S.G. Br. at 13-14] misconceive the nature of the respondents' property interest. The respondents are not asserting a claim of entitlement to be in a particular institution; they are contending that once they are in a position to enjoy the rights and benefits at a particular institution or classification level, they have a legitimate claim of entitlement to these benefits. Furthermore, Massachusetts may not be constitutionally obligated to establish a system which stresses rehabilitation of the offender and his reintegration into the community; however, the state has not only asserted that rehabilitation and reintegration are the primary purposes of corrections within its jurisdiction, but also, Massachusetts has required the Commissioner to develop a series of programs, opportunities and benefits for inmates to accomplish these statutory goals. Cf. *Goss v. Lopez*, 419 U.S. 565, 576; *Wolff v. McDonnell, supra*, 418 U.S. 539, 557-558. See also, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

It is interesting to note that the prisoners' interest in the present case is identical to that acknowledged by the Bureau of Prisons in *Cardaropoli v. Norton*, 523 F.2d 990, 995 at note 11 (2d Cir. 1975). The Bureau of Prisons' contention in *Cardaropoli*, as presented to the court, was that "[o]nly subsequent to the [initial] classification, *after the inmate has been enjoying the benefits allowed within that classification, can he have a legitimate claim of entitlement to those benefits*" [emphasis supplied]. The Government's position in this case, therefore, appears grounded upon convenience, rather than upon consistent constitutional analysis.

programming at MCI, Norfolk" (App. 175) or reflected an unwillingness or inability "to accept the responsibility comensurate [sic] with assignment to MCI, Norfolk, a medium security facility" (App. 53).[58]

However, petitioners suggest that the losses suffered by respondents are not of sufficient substance to affect the property interest protected by the Due Process Clause. Petitioners' position is refuted by prior decisions of this Court. As the Court recently noted:

> [I]n determining whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake . . . [T]he length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing "is not decisive of the basic right" to a hearing of some kind . . . *The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. Goss v. Lopez, supra*, 419 U.S. 565, 575-576 (emphasis supplied and citations omitted).

The deprivations to the respondents occasioned by their transfers are certainly not *de minimis*. Within the Massachusetts prison system, which emphasizes the reintegration of the offender into the community, educational and rehabilitative opportunities, work-release and furloughs are critical for the prisoner and enable him to establish a positive record for the Parole Board.[59] These benefits and opportunities also vitally

[58]See *note* 55, *supra*.

[59]Participation in these programs may have a real effect on the duration of respondents' sentences as well, for the Massachusetts legislature has directed that additional good time be awarded for participation in educational, vocational and other rehabilitative programs. M.G.L.A. Ch. 127, sec. 129D (1974 ed).

assist the inmate with his own self-development. Thus, the importance of these opportunities in the prison environment cannot be over-emphasized. See *Catalano v. United States, supra*, 383 F.Supp. at 351. Finally, the exclusion of respondents from these programs is not just a temporary one; it is indefinite and they could be forever barred from participation in meaningful rehabilitative activities. Cf. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Therefore, a prisoner in Massachusetts has a legitimate claim of entitlement to rehabilitative opportunities "which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

B. The Preservation of the Minimal Due Process Protections Guaranteed by *Wolff v. McDonnell* Necessitates the Application of the Due Process Clause to Petitioners' Decisions to Transfer Respondents.

Wolff v. McDonnell, 418 U.S. 539 (1974) reflects a careful examination of the due process considerations involved in internal prison administration. In an effort to avoid the procedures mandated by *Wolff*, petitioners [Pet. Br. at 28] and the *amicus* [S.G. Br. at 15-16] assert that transfers to more adverse conditions of confinement, including those at issue in the present case, involve totally different considerations than disciplinary adjudications and, as a consequence, these transfer decisions should be immune from the *Wolff* requirements. Even if petitioners' characterization of transfers accurately reflects the decisionmaking process in

prisons, either in general or in the present record, it begs the question of whether this Court, in order to preserve the force of *Wolff*, should require that procedural due process be accorded a prisoner who is transferred to more adverse conditions on the basis of alleged misconduct. Since the position advanced by petitioners has grave consequences for the continued application of the constitutional safeguards ordered in *Wolff*, their arguments should be closely scrutinized.

Petitioners' contention, to be fully understood, must be reviewed in the context of the close interrelationship between prison discipline and the reclassification transfer of an inmate to more restrictive conditions on the basis of misbehavior.

Classification has been described as "the development and administration of an integrated program of treatment for the individual, with procedures for changing the program when indicated."[60] Obviously, as petitioners concede, this process includes determinations about allegations of misconduct "which [indicate] inability to adjust in [the] general prison population"[61] [Pet. Br. at 28 and S.G. Br. at 15] [brackets supplied]. Through such a process, "classification not only contributes to the objectives of rehabilitation but also to custody, discipline, work assignments, officer and inmate morale, and the effective use of training

[60] See the *Regulations Governing Disciplinary and Classification Procedures at the Adult Correctional Institutions, State of Rhode Island* cited in *Morris v. Travisono*, 310 F. Supp. 857, 865 (D.R.I. 1970). These so-called *Morris* rules are often cited as a reflection of the combined efforts of prisoners and prison officials to devise a mutually accommodating system of regulations (See e.g. *Palmigiano v. Baxter*, 487 F.2d 1280, 1285, note 13 (1st Cir. 1973); therefore, they serve as an invaluable source of the general principles of prison decisionmaking.

[61] *Morris v. Travisono*, 310 F. Supp. 857, 868 (D.R.I. 1970).

opportunities."[62] The transfer to more adverse conditions on the basis of misconduct is the principal mechanism for increasing the number and degrees of control on an inmate's life in order to effectuate a variety of penal objectives, including rehabilitation, discipline and security. See e.g., *Wolff v. McDonnell*, 418 U.S. 539, 545, note 5 (4) (1974); *Robbins v. Kleindienst*, 383 F.Supp. 239, 242-244 (D.D.C. 1974); See also, Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal Criminal Law 117, 118 (1974).

The purpose of the disciplinary process has been described in strikingly similar terms. Indeed, the Nebraska prison officials in *Wolff v. McDonnell, supra*, 418 U.S. 539 (1974) asserted that the disciplinary process has a "major role on furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released." *Id.* at 562-563, and 548, note 8. The disciplinary process, like the classification process, often involves wide-ranging inquiries into a prisoner's behavior to further "correctional treatment goals." *Id.* at 571 (App. 109). Transfer is one of a variety of sanctions that may be imposed to effectuate these purposes (App. 117); *Robbins v. Kleindienst*, 383 F.Supp. 239, 244 (D.D.C. 1974) (Federal Bureau of Prisons).[63]

[62] *Id.* at 865.

[63] Bourde, *The Use of Involuntary Inter-Prison Transfer As a Sanction*, 3 Am. Journal of Criminal Law 117, 118 (1974). The author describes the use of the transfer as an adjunct to the disciplinary process at the federal minimum security prison in Seagoville, Texas.

Consequently, there is a substantial overlap between the disciplinary process and the reclassification by transfer of an inmate on the basis of misconduct. Both involve factual inquiries into the behavior of the inmate and the development of an appropriate response which takes into account the needs of the institution and of the individual. Thus, a transfer board might be called upon to determine whether an inmate has demonstrated "poor institutional adjustment" on the basis of his prior conduct, *Robbins v. Kleindienst, supra*, 383 F. Supp. at 243 or, as the boards convened by petitioners were required to do, to adjudicate whether specific inmates were linked to the planning and execution of fires, possessing contraband such as weapons, or trafficking in drugs (App. 39). Similarly, a disciplinary board will consider "the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals." *Wolff v. McDonnell, supra*, 408 U.S. at 571. The lines are even further blurred when transfer is a possible consequence of both classification and disciplinary proceedings because, as correctional officials have candidly realized, "[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity . . ." American Correctional Association, Manual of Correctional Standards 416 (1972).[64]

[64] See also, *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974) (in disciplinary transfers the premise of finding an infraction and the consequences of such a finding cannot be distinguished from the penalty and findings in *Wolff*); Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal Criminal Law, 127, 129 (1975).

Of equal relevance, the transfer to more adverse conditions of confinement and the disciplinary sanction for misconduct have identical consequences for the inmate. *Wolff v. McDonnell, supra*, 418 U.S. at note 19; *Fano v. Meachum*, (App. 145, note 2). As a result of either process, a prisoner's educational and rehabilitative programs can be substantially disrupted, his custody level can be significantly altered, and his opportunities for involvement in programs can be hindered.

The general interrelationship of these two processes is starkly demonstrated by the record in the instant case. The respondents were originally furnished with disciplinary reports which charged them with alleged acts of misconduct constituting major violations of institutional rules. If the inmates had been provided with disciplinary hearings on these charges, they would have been afforded the full range of due process required by *Wolff*, including notice, a hearing and a written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974). The disciplinary board, after adjudication of the charged conduct, could then have considered the respondents' entire record (App. 115) and could have imposed transfer as a sanction (App. 117). By abruptly terminating the disciplinary process and pursuing the classification route, petitioners were able to avoid the strictures of *Wolff*, despite the fact that the alleged misbehavior considered by the Board was the same as that charged in the disciplinary reports.

The identical circumstances could arise in the future, whether as a result of inadvertence or intent on the part of prison officials. There is always the possibility, of course, that officials might arbitrarily employ the

transfer device as a means of avoiding minimal due process requirements. *United States ex rel. Haymes v. Montanye*, 505 F.2d 977, 980, note 4 (2d Cir. 1974). More likely, however, prison officials will be compelled by the speed and momentum of events to forego the more cumbersome disciplinary process for the administrative convenience of summary transfer, a decision they might not reach upon calmer reflection. Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 (1950) (Frankfurter, J., concurring). See also, *Carlo v. Gunter*, 520 F.2d 1293 (1st Cir. 1975). Or a particular official, in the exercise of his good faith judgment, might misguidely propose transfer for "rehabilitation," "treatment" or "experimentation" which is indistinguishable from the imposition of a sanction for misconduct. See e.g., *Daigle v. Hall*, 387 F.Supp. 652, 658 (D. Mass. 1975); *Clonce v. Richardson*, 379 F.Supp. 338, 349 (W.D. Mo. 1974).[65] The procedural rights recognized in *Wolff* will be given short shrift in such situations.

[65]The use of euphemistic labels as a guise for punishment is already a reality in prison administration. See e.g., Hearings on Behavior Modification Programs; Federal Bureau of Prisons, 64, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary (93rd Congress, 2d Session) (February 27, 1974); *Individual Rights and the Federal Role in Behavior Modification* 7-10, 31-34, Committee on the Judiciary, United States Senate (93rd Congress, 2d Session) (November, 1974). This result is inevitable since treatment programs in prisons are invariably subordinated to custodial needs, with obvious consequences for the daily life of the inmate. Powelson and Bendix, *Psychiatry in Prison*, 14 PSYCHIATRY 73, 79, 80-83 (1951). Psychiatrists, with experience in the prison environment, recognize that often "the inmate is subjected to punitive practices which are represented as designed for his rehabilitation." *Id.* at 84.

Petitioners' solution to this dilemma, however, is to insulate transfer hearings from the due process clause on the ground that these hearings are "entirely different" from disciplinary hearings [Pet. Br. at 28]. This suggestion, while possessing simplicity, lacks every other virtue, for it would emasculate the constitutional force of *Wolff* and would result in substantial confusion in the administration of justice and of prisons in this country. At the core of petitioners' claim is the premise that there is some magical distinction which obtains from the use of labels such as "transfer," "administrative," "disciplinary" or "punitive." Yet petitioners concede that these formal distinctions have little meaning in the prison context for they recognize that "[a] transfer hearing . . . may bear aspects of a disciplinary hearing insofar as allegations of past misconduct may be heard" [Pet. Br. at 28].[66] Thus, the need is still present, as in *Wolff*, to ensure that the reasons for such a transfer are reliably found as a "hedge against arbitrary determination of the factual predicate for the imposition of the sanction." *Wolff v. McDonnell, supra*, 418 U.S. 571-572, note 19. The "paradox" of different constitutional treatment for the closely related disciplinary and transfer proceedings would be apparent to both inmates and prison officials since the need for reliable and accurate determination of the facts at issue is no less significant in either proceeding.[67]

[66]Respondents would agree that a prisoner does not have a constitutional right to two hearings on allegations of misconduct; therefore any adjudications at the disciplinary hearing could be relied on at a subsequent transfer hearing, absent a showing of an error on the face of the record or apparent procedural defects in the prior proceeding. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972).

[67]See *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973); vac. and remanded 418 U.S. 909 (1974) opinion on reconsideration on remand 510 F.2d 537 (1st Cir. 1974).

Consequently, the gossamer distinctions proposed by petitioners tend to obscure rather than clarify constitutional analysis.[68] A similar realization led the Court to reject the disquieting results of the right-privilege doctrine as of little use in resolving issues of constitutional magnitude. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The same results would obtain from elevating petitioners' emphasis upon labels to the level of constitutional doctrine. Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal of Criminal Law, 117, 159-163 (1974).

Finally, the consequences of requiring the application of due process for the imposition of discipline but not for transfer to more adverse conditions of confinement on the basis of misconduct would be devastating for the federal courts, prison officials and inmates. This dichotomy would necessitate endless judicial inquiries into whether a transfer to a higher custody status on the basis of allegations of misconduct was, in actuality, a "disciplinary" hearing. The judicial investigation into the "real" as opposed to the "purported" motive or

[68]In recognition of this problem, many lower federal courts have rejected "administration by label" and have focused instead on the effects of the transfer upon the inmate and the functional value of a hearing in the particular circumstances. See e.g., *Rosenberg v. Preiser*, 388 F. Supp. 639 (S.D.N.Y. 1975); *Robbins v. Kleindienst*, 383 F. Supp. 239, 248 (D.D.C. 1974); *Clonce v. Richardson*, 379 F. Supp. 338, 349 (W.D. Mo. 1974); *Kessler v. Cupp*, 372 F. Supp. 76, 77 (D. Ore. 1973). Post-*Wolff* cases have interpreted the decision in *Wolff* to compel such inquiries rather than an examination of "motive" or "purpose." See e.g. *Gomes v. Travisono*, 510 F.2d 537, 541 (1st Cir. 1974); *Fano v. Meachum* (App. 154, note 2).

purpose of the transfer would thrust the federal courts into a morass of subjective inquiry in the highly sensitive area of prison administration. See *Fano v. Meachum*, (App. 155-156) (Campbell, J., dissenting). Since each case would turn on its particular historical facts, the volume of litigation would produce little of consequence in the way of standards for prison administrators or inmates.[69] *Cf. Procunier v. Martinez*, 416 U.S. 396, 407 (1974).

Consequently, the petitioners' approach would soon transform the judicial guarantees of fairness in prisons, so recently recognized in *Wolff*, into hollow rights. Permitting the transfer of an inmate to escape the requirements of the Due Process Clause would signal the fact that fundamental rights in prisons are determined by prison officials, not by the Constitution. For these reasons, minimal due process safeguards must be provided prior to a transfer which results in adverse changes in the overall conditions of confinement, particularly in the present case since the transfer was predicated on allegations of past misconduct.

[69]This should be contrasted with the facts which must be evaluated when traditional constitutional analysis is employed and the effects of the transfer upon the inmate and the appropriateness of due process procedures in the particular circumstances are being considered. The progeny of *Goldberg v. Kelly*, 397 U.S. 254 (1970) attests to the familiarity and expertise of courts with these inquiries.

II.

THE TRANSFER HEARINGS FAILED TO MEET MINIMAL DUE PROCESS REQUIREMENTS BECAUSE THE NOTICE OF THE HEARINGS AND THE HEARINGS WERE INSUFFICIENT TO PROVIDE THE PRISONERS WITH A MEANINGFUL OPPORTUNITY TO RESPOND TO THE ALLEGATIONS OF MISCONDUCT.

Since the respondents were deprived of many substantial protected interests by their transfers, they were entitled to hearings that met the minimal requirements of the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 569-578 (1972). The Court, therefore, must determine what specific processes are required in order to afford a fair adjudication of the relevant issues under the present set of circumstances. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In making this determination in the instant case, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

After balancing the opposing interests of the parties in the present circumstances, the court of appeals ruled, in a carefully reasoned opinion (App. 144-156), that the hearings afforded the prisoners in this case were constitutionally deficient since (1) the notices of hearings given respondents were inadequate to inform them properly of the serious allegations against them

(App. 152) and (2) no summary was provided respondents of the *in camera* informant testimony relied on by the hearing board (App. 151-152).

A. A Careful Balancing Of The Countervailing Interests Demonstrates That The Respondents Were Entitled To The Minimal Procedural Requirements Extended To Prisoners In *Wolff v. McDonnell*.

This Court has already had the opportunity, in *Wolff*, to reflect at length on certain of the competing interests of prison officials and prisoners in determining the quantum of due process required for internal prison hearings where prisoners suffer the loss of good conduct time or a major adverse change in the conditions of confinement. The inmates in this case have an interest identical to the prisoners in *Wolff*[70] in avoiding the immediate and substantial deprivations which result from transfer to more adverse conditions on the grounds of alleged misconduct without due process of law. Moreover, the function of the respondents' hearings was to adjudicate allegations of serious misconduct on the part of the prisoners.[71] Therefore, both parties had an equal interest in ensuring that the

[70]In some respects, the consequences of respondents' transfers may be more serious than those flowing from the loss of good time or from solitary confinement. Good time may be restored to the inmate in the future while the stigma associated with an intrastate transfer based on allegations of misconduct will be permanent, regardless of the subsequent exemplary behavior of the inmate. Also, solitary confinement is usually of limited duration. See M.G.L.A. Ch. 127, sec. 40 (1975 ed.) However, this is not the case when an inmate is transferred to more restrictive conditions, for he may remain there indefinitely.

[71]See Brief For Respondents, pp. 2-4.

decisions to transfer had been reached fairly and on the basis of accurate and reliable information.[72] *Richardson v. Perales*, 402 U.S. 389, 401-402 (1971); *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Robbins v. Kleindienst*, 383 F. Supp. 239, 247-248 (D.D.C. 1974). A hearing in this context would be far from an empty form and would prod prison officials to live up to their obligations to review the facts impartially. The state has an interest similar to the inmate's in ensuring reliable and accurate information, an interest acknowledged by the petitioners in the instant case when they afforded prisoners a "hearing" to inquire into the allegations of misconduct.[73]

[72]Petitioners recognize this interest as well when they acknowledge that the state's concern in the security of its institutions cannot be served by transfers based on "arbitrary or capricious information." (Pet. Br. 33). Petitioners assert, however, that the requirement of accuracy is satisfied by the good faith of prison officials. (Pet. Br. 23). However, "a conclusion [that] satisfies one's private conscience does not [necessarily] attest to its reliability." *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, 341 U.S. 123, 171 (1951). Errors may also have unintentional origins. See, Sirico, *Prisoner Classification and Administrative Decisionmaking*, 50 Texas L. Rev. 1229, 1242-1243 (1972). Good intentions on the part of prison administrators do not obviate the need for due process. Cf. *In re Winship*, 397 U.S. 358, 365-366 (1970).

As one observer of prisons has noted, abdication to the "good faith" of prison administrators has unfortunate consequences:

> The elusive goal of rehabilitation spawns decisionmakers desirous of unfettered discretion ot tinker with the prisoners' fates. *Secure in the knowledge of their own good faith, they often do not appreciate their ability to err, become indifferent to the awesome power they wield, and fail to recognize the responsibility placed on them by the lack of checks on their discretion.* Sirico, *supra* at 1239-1240.

[73]See note 72, *supra*.

In light of these considerations and of the balance already struck in *Wolff*, petitioners are required to provide minimal due process protections unless they can demonstrate that legitimate penal objectives justify further limitations in the instant case.

Numerous interests are asserted by petitioners and *amicus* for not requiring transfer hearings. However, many of these interests have already been accommodated by the balance struck in *Wolff*. The others are not appropriate for consideration on the record before this Court since the respondents' transfers were based on allegations of serious prior misconduct.

1. Security needs, avoidance of "tensions" and rehabilitation.

Petitioners and the Solicitor General argue that security needs, rehabilitation and the avoidance of "tensions" necessitate a summary transfer process. However, the Court in *Wolff* accommodated these interests in requiring minimal due process protections for disciplinary proceedings in the unremitting tension of a maximum security prison. *Wolff v. McDonnell*, 418 U.S. 539, 562 (1974). Petitioners and *amicus* have not pointed to anything in the medium security environment of Norfolk which prevented them from conducting hearings for respondents on the allegations of prior misconduct. Vague, generalized notions of prison security, unsupported by the present record, should not be sufficient to tip the careful balance struck by *Wolff*.

Moreover, contrary to their position, [Pet. Br. at 24-25] [S.G. Montanye 42-45],[74] the results of careful

[74]The *Amicus* relies primarily on the case of *Braxton v. Carlson*, 483 F.2d 933 (3rd Cir. 1973) [S.G. Montanye at 43], which was decided before *Wolff v. McDonnell*, 418 U.S. 539 (1974).

investigations into prison decisionmaking prove that a reduction in tensions obtains from fair procedures in prisons. See e.g., Note, *Bargaining in Correctional Institutions: Restructuring The Relation Between The Inmate and The Prison Authority*, 81 Yale L.J. 726 (1972); D. Glaser, *Effectiveness of a Prison and Parole System* 87 (Abridged ed. 1969); *The President's Commission on Law Enforcement and Administration of Justice: Corrections* 83 (1967). Indeed, it is likely that tensions would be exacerbated by an unexplained decision or, as in the instant case, by a ritualistic, Kafkaesque process, rather than by the provision of a hearing, for in the former situations, the prisoner can only assume that prison officials acted arbitrarily and unreasonably. See *Catalano v. United States*, 383 F. Supp. 346, 351 (D. Conn. 1974). See also *Clonce v. Richardson*, 379 F. Supp. 338, 351 (W.D. Mo. 1974).

Finally, both national commissions which have recently studied prisons have concluded that rehabilitation is not furthered by "authoritarian control" [S.G. Br. Montanye at 26][75] but by procedures which avoid reactions to arbitrariness by maximizing an inmate's participation in decisions which affect his life. *President's Commission on Law Enforcement and Administration of Justice: Corrections* 13, 82-84 (1967); *National Advisory Commission on Criminal Justice Standards and Goals: Corrections* 55 (1973). See also,

[75]A careful reading of Glaser, *The Effectiveness of a Prison and Parole System* 122-123 (1969) and Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction* (1962), which are cited by *amicus* [S.G. Montanye at 26], supports a position contrary to that asserted by the Solicitor General. Both authors stress the need for fairness in proceedings and closer inmate-staff relationships as a means of ensuring rehabilitation of the prisoner.

D. Fogel, *We Are The Living Proof: The Justice Model of Corrections* 204-208 (1975); Fox, *Why Prisoners Riot*, 35 Fed. Prob. 9 (1971); Note, *Bargaining In Correctional Institutions: Restructuring The Relation Between The Inmate and the Prison Authority*, 81 Yale Law Journal 726 (1974); Cf. *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973); *Landman v. Peyton*, 370 F.2d 135, 141 (4th Cir.) cert. den., 385 U.S. 881 (1966).[76]

2. The "Emergency" Justification

The petitioners and *amicus* argue that the requirement of a hearing would prevent prison officials from dealing with emergencies. The record in this case, however, belies this contention, for the petitioners were able to handle adequately a perceived emergency by segregating the respondents (App. 55-56) and by still affording them a "hearing" prior to their transfers. The appropriateness of the "emergency" justification should await a record that suggests that prison officials were prevented by an emergency from providing any hearings for inmates charged with past misconduct.

In addition, this Court had already recognized that there are "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). See also, *La Batt v. Twomey*, 513 F.2d 641, 645-646 (7th Cir.

[76]Prison officials in Massachusetts also recognize the close relationship between rehabilitation and fair proceedings. Commissioner's Bulletin 72-1 describes the policy of the disciplinary rules as follows: "These rules are promulgated in the belief that a *speedy and fair adjudication of alleged wrong-doing coupled with meaningful sanctions contributes to the maintenance of security and the rehabilitation of the resident.*" (App. 109) (emphasis supplied)

1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973) vacated and remanded *sub nom. Travisono v. Gomes*, 418 U.S. 909 for reconsideration in light of *Wolff v. McDonnell*, opinion on reconsideration after remand 510 F.2d 537 (1st Cir. 1974); *Hoitt v. Vitek*, 361 F. Supp. 1238, 1253 (D. N.H. 1973), aff'd 497 F.2d 598, 600 (1st Cir. 1974).

Consequently, in emergency situations, prison officials would still be able to postpone whatever procedures are required. See *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974); *La Batt v. Twomey*, 513 F.2d 641, 645-646 (7th Cir. 1975). The "emergency" doctrine, rather than the wholesale authorization of summary transfers, reflects an appropriate concern for the pressures on prison authorities without sacrificing the inmate's rights to procedural fairness.[77]

3. The asserted need to make discretionary decisions

Petitioners repeatedly assert that the question of transfer should be left to the sound discretion of prison officials (Pet. Br. 26, 27, 28, 33).

However, the record again does not support petitioners' argument. Petitioners are unable to point to anything in the present record that would suggest that their discretion was limited in the instant case by the

[77]However, the necessary due process protections should be provided "as soon as practicable" after the transfer. *Goss v. Lopez, supra*, 419 U.S. 565, 582-583 (1975). See also *Hoitt v. Vitek*, 497 F.2d 598, 600 (1st Cir. 1974) (unreviewable discretion of prison officials in what they view to be an emergency is not open ended or time limited).

provision of hearings for the respondents prior to their transfers. Moreover, the nature of the hearings afforded the respondents does not support petitioners' general assertion that transfer proceedings involve broad discretionary considerations; indeed the very opposite appears to be the case, for the record reflects that the decisions to transfer respondents were based on adjudications of allegations of the prisoners' prior misconduct.[78]

Furthermore, regardless of the circumstances, "(a) simple factual hearing will not interfere with the

[78]Petitioners find support for their argument in Judge Campbell's dissent in *Fano v. Meachum* where he concludes that summary transfers are warranted:

> (A)dministrative realities may sometime necessitate the flexibility to transfer even on the basis of demonstrably inadequate information . . . . A forty percent risk that an inmate will disrupt or set a fire may in some circumstances be too great to take. (App. 153)

However, this dictum in the dissenting opinion overstates the issue in the present case, for the respondents do not question the adequacy of the information relied on by the petitioners, but instead, challenge the failure of the petitioners to provide the prisoners with adequate notice of this information or with *any* meaningful opportunity to be heard when charges of prior misconduct are being considered. The question of whether a prison official can act on "demonstrably inadequate information" should await a proper record before this Court.

Also, the discretion of prison officials is not unfettered. The touchstone of due process is the protection of the individual from the arbitrary action of government, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Due process is a qualitative concept, not a quantitative one that depends on the percentage of error of a decision maker. Therefore, the quantum of information available to a prison official is not the relevant consideration; prison officials still retain the flexibility to act upon limited information as long as they "act fairly." *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

exercise of discretion." *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Robbins v. Kleindienst*, 383 F. Supp. 239, 246-247 (D.D.C. 1974). See also, E. Kimball and D. Newman, *Judicial Intervention in Correctional Decisions – Threat and Response*, 14 Crime and Delinquency 1, 9 (1968). Once factual matters are verified, erroneous information is corrected, and other relevant data is obtained from the inmate, there would be little room to challenge the considered, good faith exercise of discretion, unless the determination was arbitrary and capricious in the circumstances. Cf. *Ferrell v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972). Thus, the discretion of correctional officials would not be impinged upon by affording prisoners a hearing, and the opportunity for reliable and successful decisions would be more likely.

4. The Asserted Unsuitability of the Issues For Resolution

Petitioners (Pet. Br. at 25) and *amicus* [S. G. Montanye at 45, 46] assert that transfer decisions raise issues that are unsuitable for the provision of minimal due process protections since transfers may involve determinations of predictive behavior, the appropriateness or availability of rehabilitative programs or other administrative concerns. However, regardless of the validity of this contention in other circumstances, it lacks any substance in the present record since the respondents' hearings focused solely on allegations of past misconduct. Petitioners could hardly argue that these issues were unsuitable for determination at a hearing, for they conducted such hearings on these allegations in the instant case. Moreover, lower federal

court decisions since *Wolff* have repeatedly recognized the need for due process procedures, even when the transfers were not triggered by a specific act of misconduct, but were based on assessments of prior conduct. *Carlo v. Gunter*, 520 F.2d 1293 (1st Cir. 1975); *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974); *Catalano v. United States*, 383 F. Supp. 346 (D. Conn. 1974); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974). These cases realistically conclude that nearly all prison decisions which have adverse consequences for the inmate, regardless of the purported purposes, involve determinations of past conduct where facts might be in dispute or in error.

Finally, as the *amicus* concedes, transfer hearing always involve factual issues [S.G. Br. 17]; therefore, a hearing would still be necessary for the appropriate resolution of the issues at hand. In the instant case, the controverted facts are obvious since the respondents were charged with allegations of prior misbehavior. In the other situations suggested by petitioners, past conduct may still be at issue and may form an important aspect of the transfer decision; therefore, the need for inmate involvement to resolve disputed facts, correct erroneous information or verify information in the file is no less compelling. The hearing would also provide the inmate with a brief opportunity to present reasons to the decisionmaker why he should not be transferred to a closer custody status and to call extenuating circumstances to the attention of the Board. Prison officials cannot plausibly claim to know so many facts about each inmate, that there is no

information that the inmate could possibly contribute that would influence a transfer decision.[79]

Consequently, the record before this Court fails to support any of the justifications suggested by petitioners for failing to afford the respondents the minimal requisites of due process.[80]

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[79]In a few situations, such as overcrowding, where objective conditions or facts extrinsic to the inmate's prior conduct leave little room for question, a hearing may not be necessary as long as the inmate is afforded an adequate opportunity to respond to the transfer decision. Presumably, the inmate, if informed of the objective, non-arbitrary character of the decision, would waive his hearing. *Gomes v. Travisono*, 510 F.2d 527, 541 (1st Cir. 1975). If the prisoner is not afforded a hearing, however, the record should clearly demonstrate that his prior conduct did not play any role in the transfer decision. See *Rosenberg v. Preiser*, 388 F. Supp 639 (S.D. N.Y. 1975).

[80]Petitioners' argument that these hearings would be administratively burdensome is equally unpersuasive. First, the record in this case fails to support this assertion, for the petitioners did conduct hearings on the allegations of respondents' prior misconduct.

Second, available statistical evidence does not suggest that such hearings would impose a greater burden upon petitioners than disciplinary hearings. During 1973, the Federal Government alone conducted 19,000 misconduct hearings. *Wolff v. McDonnell*, 418 U.S. 539, 574 (1974). In the instant case the Solicitor General states that the number of medium to maximum security transfers only numbered about 1,200 in fiscal year 1975 (S.G. Br. at 3). There are no transfer figures for Massachusetts cited by the petitioners; however, it is safe to assume that the proportions are similar. Since procedural safeguards are offered in the area of prison discipline, which involves a substantially greater number of cases, the petitioners could hardly assert that it would be burdensome to provide transfer hearings.

B. The Hearings Provided The Prisoners Did Not Comply With The Minimal Requirements of the Due Process Clause.

1. Respondents Were Entitled To A Sufficiently Detailed Notice To Allow Them To Prepare Adequately for The Hearings.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court held that the minimum requirements of procedural due process entitle a prisoner to "advance written notice of the claimed violation," 418 U.S. 539, 563 (1974). At a minimum, the notice must "inform [the inmate] of the charges and . . . enable him to marshal the facts and prepare a defense." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) [brackets supplied]: *Goldberg v. Kelly*, 397 U.S. 254, 267-268. Thus a primary function of this notice is "to clarify what the charges are, in fact." *Id.* at 564. Without sufficient notice, it is doubtful that the prisoner could "benefit from any hearing that was provided." Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1281 (1975). See also, *Morgan v. United States*, 304 U.S. 1, 3-4 (1938). In the present context, this notice should at least inform the inmate of the reasons why he may be transferred and apprise him of the underlying facts or adverse information which may be considered. See *Almanza v. Oliver*, 368 F. Supp. 981, 986 (E.D. Va. 1973); *Catalano v. United States*, 383 F. Supp. 346, 352 (D. Conn. 1974).

However, the notice to respondents in this case provided none of this vital information and failed to perform the requisite functions.[81] Rather than clarify

[81] The sufficiency of notice is challenged in this case, not the timing of the notice. The prisoners were notified several days in advance of the hearings and, in light of the serious allegations of misconduct, notice at that time was required.

the charges of serious misconduct, it obfuscated them. As the district court recognized, the notice did not even state the time and place of the alleged offense with reasonable accuracy (App. 137, 152). There was no indication of where the alleged violations had occurred, who had participated in them, when they had taken place, or what "instruments" had been possessed. Such notice certainly was insufficient to inform adequately the respondents of the charges against them and to enable them to prepare an appropriate defense.

The "hearings" demonstrate the utter inadequacy of the notices. Since respondents had no relevant information about the charges, the only plausible defense available to them was to make bald assertions that they were not involved in the alleged misconduct (App. 71, 75, 81-82, 94-95, 100, 105), or to introduce general information about their character or reputation (App. 70, 99, 105). The respondents were left to grope in the dark for some evidence, some statement that would convince the skeptical board of their position.[82]

Absent adequate notice, the pitfalls for the unwary or innocent are obvious: their denials of involvement in specific incidents can be interpreted as evidence of participation (App. 100). It is hardly surprising that the guilty individual may be in a better position in such circumstances because his knowledge of specifics might enable him to contrive a credible explanation for his conduct. In addition, inmates were unable to prepare necessary defenses to the allegations of misconduct. For example, Dussault and DeBrosky were charged with possessions of instruments or materials that might be used as "weapons" (App. 39, 40, 64). However, had the

[82] See Brief for Respondents, p. 4, note 6.

inmates known of the particular "instruments" or "materials" in question, they might have demonstrated that the "weapons" were used for institutional trades rather than for any illegal purposes (App. 70, 72, 94).

The hearings, for the most part, focused on irrelevant matters as the prisoners struggled to impress the Board with the reasons as the prisoners struggled to impress the Board with the reasons why they should stay at Norfolk.[83] However, the Board treated the information presented by the inmates as immaterial because the relevant inquiry had already been concluded by the time respondents and counsel were invited to reenter the hearing room.[84] The hearing was, therefore, an exercise in futility for the inmate whose feeble efforts underscored the functional inadequacy of the notice. See also, *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); *Sostre v. McGinnis*, 442 F.2d 178, 198 (2nd Cir. 1971). The procedures so proudly touted by the petitioners [Pet. Br. at 6-7] only provided formal, ritualistic trappings for a "secret one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J. concurring). See also *Morgan v. United States* 304 U.S. 1 (1938).

[83]See Brief for Respondents, p. 4, note 6.

[84]In at least one case, the inmate, upon entering the room, was informed by the Board that it had already concluded that the informant information was reliable before affording the prisoner any opportunity to be heard (App. 59).

2. The Respondents Were Entitled In The Particular Circumstances Of The Present Case To A Summary Of The Informant Information To Ensure A Meaningful Opportunity To Be Heard Prior To Their Transfers.

Petitioners assert that they were not constitutionally required to provide the respondents with a summary of the *in camera* informant information which formed the basis of the board's decisions because its disclosure "would . . . seriously compromise the physical safety of the informants." (Pet. Br. at 30). Petitioners' contention reflects a misunderstanding of the limited scope of the Court of Appeals' decision which merely applied traditional notions of due process to the actions of prison officials.

Contrary to the broad assertions of the petitioners, the requirement of a summary of informant information in the specific circumstances of this case adds nothing to what is already required by *Wolff*. As the Court of Appeals stated, one of the minimal requirements in a prison hearing is a "written statement as to the evidence relied on and the reasons for the disciplinary action" (App. 150). In view of this requirement, the limited issue raised by the instant record is whether there is any constitutional difference between providing the inmate, subsequent to the hearing, with a statement of the evidence relied on to support the allegation of misconduct and supply the identical information to the prisoner at the hearing.

Petitioners have not suggested, however, that such a constitutional distinction could be maintained nor can they point to anything in the record that would justify such a finespun analysis. Instead, petitioners assert a blanket right to refuse to provide a summary of the informant information. Since petitioners' position im-

pinges directly on the fundamental rights to a written statement and to a meaningful opportunity to be heard, it must be carefully analyzed. The Court of Appeals recognized that the present case only involved a limited inquiry because Institutional Order 4310.1, which is the product of correctional expertise in Massachusetts, provides a source of guidance for the appropriate procedures to be followed by prison officials in these circumstances (App. 151). This order requires that a summary of informant information be supplied to inmates in internal prison proceedings where allegations of major misconduct are at stake and where serious sanctions, including transfers, may be imposed (App. 117).[85]

Thus, state prison officials in Massachusetts have established a standard of due process governing the present circumstances and have already determined that the provision of a summary of informant information is

[85]This order represents a balance between the need for informant information in the prison context and the realistic recognition of the unreliability of this information. Numerous commentators have concluded that prison informants are unreliable, for self-interest, revenge or other venal motives may generate their information. Therefore, they are prone to fabrications, inaccuracies, or exaggerations. G. Sykes, *The Society of Captives*, 87-89 (Princeton University Press); McCorkle and Korn, "Resocialization Within Walls", Annals of American Academy of Political and Social Science, 293: 88-89 (May, 1954); Wilmer, *The Role of The "Rat" In The Prison*, 29 Fed. Probation 44-45 (March, 1965). The fact that I.O. 4310.1 was in effect at Walpole at the time of respondents' hearings cannot shield petitioners from their constitutional obligations, for petitioner Hall, the Commissioner of Correction, is charged with notice of its contents and with ensuring that the Constitution is not ignored in state prisons (App. 136).

not unduly burdensome or unworkable in the prison context. See *Wolff v. McDonnell*, 418 U.S. 539, 569 (1974); *Palmigiano v. Baxter*, 487 F.2d 1280, 1286 (1973). Therefore, the only consideration in the present set of circumstances was whether petitioners were able to justify their failure to provide similar protections to inmates at Norfolk.[86] However, petitioners were unable to point to any evidence in the record to justify such a failure. The district court and Court of Appeals gave short shrift to the vague notions of "prison security" postulated by petitioners, for these arguments are significantly undercut by the fact that the procedures were being followed at Walpole. If petitioners could have supplied some other reason unique to the security of Norfolk, a medium security prison, which would have justified more stringent procedures for the use of informant information than those followed at maximum security prisons, they certainly would have done so. The Court of Appeals, therefore, recognized that, in the present case, petitioners could not provide any justification for the substantial encroachments on the minimal procedures guaranteed by *Wolff* (App. 151-52).

Petitioners contend, however, that *Wolff* sanctions their failure to provide a summary of the informant information and rely upon the dictum of the Court that there "may be . . . occasions when personal or institutional safety are *so* implicated, that the statement [of evidence and reasons] may properly exclude *certain* items of evidence." *Wolff v. McDonnell*, 418 U.S. 539, 565 (1975) (emphasis supplied). Besides ignoring the thrust of the Court of Appeals' decision, the petitioners misconstrue the import of this Court's language. The

[86]See note 9, *supra*.

limited exception articulated in *Wolff*, which *may* permit the exclusion of *particular* items of evidence, does not mean that *all* items in the statement may properly be eliminated, nor does it permit the petitioners to transform the opportunity to be heard into a hollow ritual. Cf. *Gonzalez v. United States*, 304 U.S. 1 (1938). See also, Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1283 (1975). The discretion of prison officials in these circumstances has been sharply circumscribed, since the "written statement" is necessary to meet "the minimum requirements of procedural due process," *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). Their discretion is even more limited in the present circumstances because the petitioners have already promulgated a regulation which provides for the release of a summary of informant information.

The Court of Appeals appropriately realized that, in light of these limitations on the discretion of prison officials in Massachusetts, petitioners' could not merely assert, without justification, that none of the information could have been supplied to the respondents at their hearings. Moreover, the petitioners did not demonstrate on the record how "personal safety" or "institutional safety" would have been implicated by the release of something less than the entire summary which, at the very least, would have apprised the inmate of the time, place and nature of the charges. Thus, the Court of Appeals was eminently correct in its recognition that the failure of the petitioners to release the summary of the allegations of misconduct was not only fundamentally unfair but also permitted a limited exception to swallow up the constitutional rule.

CONCLUSION

The respondents' transfers to substantially more adverse conditions of confinement on the basis of allegations of misconduct resulted in significant changes in their freedom of movement and substantially limited their involvement in important rehabilitative programs. The notation in their files only exacerbated these immediate deprivations and affixed a permanent stigma on their reputations within the prison community. Furthermore, respondents had a legitimate claim of entitlement to the various rights, benefits and opportunities associated with incarceration at Norfolk, a medium security institution, and their transfer to maximum security prisons impinged on this fundamental property interest. Finally, as respondents have argued, the application of the Due Process Clause to the transfer of respondents to more adverse conditions of confinement on the basis of allegations of misconduct would prevent the swift demise of the constitutional rights so recently recognized in *Wolff*. Any of these factors, standing alone, should compel the application of the Due Process Clause to respondents' transfers. When combined, they highlight the overwhelming reasons for ensuring that a prisoner who is transferred to more adverse conditions of confinement on the basis of misbehavior is afforded the protections of the Due Process Clause.

The determination of what process is due in the present circumstances involves a balancing of the interests of the inmate in avoiding a summary transfer and of the interests of correctional officials in the pursuit of legitimate correctional goals. In the instant case, this inquiry is not very broad, for the interests asserted by the petitioners have either been accom-

modated by the balance struck in *Wolff* or lack any evidentiary support in the record before this Court. Therefore, those minimal due process procedures which are afforded in prison disciplinary hearings to ensure reliable and accurate adjudications of allegations of misconduct should be required. Respondents do not seek a trial-type proceeding; they merely contend that adequate notice, a meaningful opportunity to be heard and a written statement of the evidence relied on in reaching the decision is fundamentally fair in the present circumstances.

The petitioners, however, seek complete immunity from these procedural requirements, despite the fact that respondents' hearings involved determinations of allegations of past misconduct. The devastating implications of the petitioners' position are clearly illustrated by the present record. The petitioners rely on *Wolff v. McDonnell*, a decision that articulated the minimal requirements of due process in internal prison hearings, to justify notices that did not even apprise the inmates of the time and place of the alleged misconduct, hearings that did not provide the inmate with any opportunity to rebut the charges of misbehavior, and written statements that do not contain any reference to the evidence relied upon. The discretion afforded prison officials does not permit them to redraw so cavalierly the iron curtain between the prisons of this country and our Constitution.

For all of the reasons mentioned in the Brief, the respondents submit that the judgment of the Court of Appeals for the First Circuit should be affirmed.

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APPENDIX

STATUTORY REFERENCES
MASSACHUSETTS GENERAL LAWS ANNOTATED

CHAPTER 124

§ 1. *Power and Duties of Commissioner*

In addition to exercising the powers and performing the duties which are otherwise given him by law, the commissioner of correction, in this chapter called the commissioner, shall:

* * *

(e) establish, maintain and administer programs of rehabilitation, including but not limited to education, training and employment, of persons committed to the custody of the department, designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the commonwealth;

(f) establish a system of classification of persons committed to the custody of the department for the purpose of developing a rehabilitation program for each such person;

CHAPTER 127

§ 32. *Treatment of Prisoners*

The superintendents of the institutions under the supervision of the department of correction shall treat the prisoners with the kindness which their obedience, industry and good conduct merit.

§ 40. *Confinement to Isolation Unit in Correctional Institutions*

For the enforcement of discipline, an inmate in any correctional institution of the commonwealth may, at the discretion of its superintendent, be confined, for a period not to exceed fifteen days for any one offence, to an isolation unit.

Such isolation units must provide light, ventilation and adequate sanitary facilities, may contain a minimum of furniture, and shall provide at least one full meal daily.

§ 48. *Establishment and Maintenance; Rules and Regulations*

The commissioner shall establish and maintain education, training and employment programs for persons committed to the custody of the department. The administrators of county correctional facilities shall establish and maintain such programs for persons committed to such facilities. Such programs shall include opportunities for academic education, vocational education, vocational training, other related prevocational programs and employment, and may be made available within correctional facilities or, subject to the restrictions set forth in sections forty-nine and eighty-six F, at other places approved by the commissioner or administrator. In determining which employment programs to establish and maintain under the authority of this section, the commissioner or administrator shall take into account, first, the training value of the program, second, the job market and employment conditions in the community and third, in the case of programs to be carried out within a

correctional facility, the types of goods and services required by the commonwealth and its subdivisions.

The commissioner shall make and promulgate rules and regulations governing programs established under this section which shall include provisions for hours, conditions of employment, wage rates for employment program participants, incentive payments for education and training program participants, and deductions from said wages pursuant to the provisions of section eighty-six F.

§ 49. *Participation of Inmates in Programs Outside Correctional Facilities; Eligibility; Sentence Credit; Rules and Regulations; Escape, Punishment; Public Employment; Labor Dispute Restriction*

The commissioner of correction, subject to rules and regulations established in accordance with the provisions of this section, may permit an inmate who has served such a portion of his sentence or sentences that he would be eligible for parole within eighteen months to participate in education, training, or employment programs established under section forty-eight outside a correctional facility; provided that no committed offender is serving a life sentence or a sentence in a state correctional facility for violation of section thirteen, thirteen B, fourteen, fifteen, fifteen A, fifteen B, sixteen, seventeen, eighteen, eighteen A, nineteen, twenty, twenty-one, twenty-two, twenty-two A, twenty-three, twenty-four, twenty-four B, twenty-five, or twenty-six of chapter two hundred and sixty-five, or section seventeen, thirty-four, thirty-five, or thirty-five A, of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said

sections shall be eligible to participate in education, training or employment programs outside a correctional facility, as established under section forty-eight, except on the recommendation of the superintendent on behalf of a particular committed offender and upon the approval of the commissioner.

In the case of a committed offender who participates in any program outside a correctional facility established under section forty-eight, the time spent in such participation shall be credited toward the serving of his sentence in the same manner as though he had served such time within the facility. A committed offender enrolled in any such program shall remain subject to the rules and regulations of the correctional facility and shall be under the direction, control and supervision of the officers thereof during the period of his participation in the program. The commissioner shall make and promulgate rules and regulations regarding programs established under section forty-eight outside correctional facilities. Such rules and regulations shall include provisions for reasonable periods of confinement to particular correctional facilities before a committed offender may be permitted to participate in such programs and provisions for feeding, housing and supervising participants in such programs in such manner as will be calculated to maintain morale and prevent the introduction of contraband to the facility.

If any inmate who participates in any program outside a correctional facility established under the provisions of section forty-eight leaves his place of employment, or having been ordered by the commissioner to return to the correctional facility, neglects or refuses to do so, said inmate shall be held to have escaped from said prison or institution and shall, upon

conviction of such escape, be sentenced to a state correctional facility for a term of not less than three years and not more than five years, and all deductions from the sentence or sentences he was serving at the time of such escape, authorized by section one hundred and twenty-nine, shall be forfeited, but said inmate shall be entitled to a deduction of sentence on any sentence imposed for said escape.

Committed offenders who are gainfully employed outside a correctional facility may be so employed by an agency of the commonwealth other than the department of correction or by public or private employers. The rates of pay and other conditions of employment for a committed offender so employed shall be the same as those paid or required in the locality in which the work is performed provided that no committed offender employed by an agency of the commonwealth shall be subject to sections nine A or nine B of chapter thirty, or chapter thirty-one, and in no case shall such rates of pay be less than those paid by his employer to other employees doing similar work. No committed offender shall be so employed at a place where there exists any strike or work stoppage arising from a labor dispute of any kind.

§ 49A. *Evaluation of Inmates for Participation in Programs Outside Correctional Facilities; Committees; Recommendation*

Before any inmate may be considered for participation in education, training, or employment programs established under section forty-eight outside a correctional facility, or in any other program outside a correctional facility, or in any other program outside a correctional facility exclusive of parole, he shall first

demonstrate that he is responsible and deserving of these opportunities.

The commissioner shall establish, in each state correctional facility, one or more committees made up of representatives from all segments of department of corrections staff, especially correction officers. Said committees shall take the form of teams of five correctional staff members, appointed by the superintendent of the correctional facility, at least two of whom shall be correction officers.

Said committees shall evaluate the behavior and conduct of inmates within the prison. In evaluating an inmate's behavior and conduct within the prison, said committee shall interview the inmate, and shall have access to disciplinary reports and other appropriate records. After evaluating the inmate's behavior and conduct within the prison, said committee shall make a recommendation to the superintendent of the correctional facility as to whether or not the inmate shall be permitted to participate in any program outside a correctional facility, exclusive of parole. Said recommendation shall be made in writing, and shall include the vote of said committee in making said recommendation.

§ 97. *Transfers from and to Correctional Institutions; Approval*

The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution

except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth.

§ 129D. *Work, Educational, Vocational Training and Rehabilitation Programs; Deduction of Sentence for Good Conduct*

For the satisfactory conduct of a prisoner while confined at a correctional institution of the commonwealth, but working at a state hospital or state school, satisfactory completion of an educational program leading to the award of a high school equivalency certificate, satisfactory performance of said prisoner in completion of any other educational sequence or any vocational training program established within or without the institution, satisfactory performance of said inmate over a period of six months when he or she is employed on work-release or in a prison industry, or satisfactory performance of siad inmates in any other program or activity which the superintendent of the institution shall deem valuable to said prisoner's rehabilitation, the commissioner may grant, in addition to the deductions of sentence provided under sections one hundred and twenty-nine and one hundred and twenty-nine C a further deduction of sentence of not more than two and one-half days for each month while said prisoner is working in a state hospital or school, on work-release or working in a prison industry, or partaking in any of the said programs or activities as aforesaid. Such further deduction of sentence under

said sections one hundred and twenty-nine and one hundred and twenty-nine C for reducing the term of imprisonment by deduction from the maximum term for which he may be held under his sentence or sentences, and for reducing from the minimum term of the sentence or sentences the good conduct credits earned under this section for parole eligibility as provided under section one hundred and thirty-three.

A prisoner whose term of imprisonment is reduced from the maximum term for which he may be held under his sentence or sentences shall receive from the commissioner a certificate of discharge on the date which has been determined by such additional deductions from the maximum term of his sentence or sentences.

No. 75-252

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

LARRY MEACHUM, ET AL., PETITIONERS

v.

ARTHUR FANO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the question whether the Due Process Clause requires notice and opportunity for hearing on the propriety of a transfer of a prisoner between prisons of different security classifications.[1]

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[1] We do not discuss the question whether, if the Due Process Clause applies, the particular procedures followed by the state officials in this case were adequate. Nor do we discuss the court of appeals' argument (Pet. App. 35-36) that the Equal

INTEREST OF THE UNITED STATES

Like *Montanye* v. *Haymes*, No. 74-520, certiorari granted, 422 U.S. 1055, the instant case presents questions regarding the procedures prison officials must follow when deciding to move inmates from one place of incarceration to another. Although this case involves only the practices of prisons in a single state, the Court's decision may directly affect the existing practices and procedures for management and control of prisoners in other prison systems, including the federal prison system. Our interest in this case is similar to that expressed at pages 1-4 of our brief *amicus curiae* in *Montanye*.[2]

Unlike *Montanye*, this case involves transfers between institutions of different custody levels. The United States has a particular interest in that element of the case because, unlike some States, the federal government maintains a prison system in which prisoners are confined at various levels of custody according to the nature of the offense committed, the character and mental condition of the prisoner, and the prisoner's discipline, care, and treatment needs. Federal prisons are broadly divided into minimum,

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Protection Clause requires administrators to use identical procedures in all prisons. As to the latter, however, we observe that if the court of appeals were correct, it would be impossible to experiment with different procedures in different prisons in order to analyze the effects of each; every prisoner would acquire an entitlement to the most favorable procedure in effect at any prison, and experimentation and change would be discouraged.

[2] We are furnishing the parties' counsel with copies of that brief.

medium, and maximum security institutions; other prisons serve special populations such as youthful offenders and narcotics addicts.

During fiscal year 1975, 518 inmates in the federal prison system were transferred from medium security institutions to maximum security institutions, and 621 inmates were transferred from minimum security prisons to medium or maximum security institutions. Numerous prisoners also were transferred within a single prison to different work and rehabilitative programs; many of these latter transfers resulted in consequences to the inmate similar to those that would occur as a result of transfers between institutions of different security classifications.[3]

STATEMENT

1. Between August 13, 1974, and October 23, 1974, nine serious fires[4] were set in the Massachusetts Correctional Institution at Norfolk, a medium security institution. Prison officials received information from

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[3] Each institution has within it different degrees of that custody level: close, medium, and minimum. "Close custody" usually entails restriction to the prison's security perimeter; "medium custody" means that the inmate may work outside the security perimeter under direct supervision; "minimum custody" means that the inmate may work outside of the security perimeter under periodic checks. A prisoner in minimum custody at a maximum security institution may therefore enjoy conditions less restrictive than those imposed upon a prisoner in close custody at a medium security institution.

[4] Firemen from outside the prison had to be summoned to extinguish the fires.

informants that certain inmates were responsible for the fires and for other disturbances in the prison. Those inmates, including respondents, were taken from the general population and placed in the Receiving Building, an administrative detention area used to process new inmates.[5]

On October 25, 1974, each respondent was given a disciplinary report setting forth the reasons for his removal from the general population.[6] On November 4, 1974, each respondent was given notice of an impending classification hearing. The notice stated: (1) that following the classification hearing a recommendation concerning the inmate's institutional status or transfer would be made; (2) that the inmate would be confined in "an awaiting action area" pending the hearing; and (3) that information had been received accusing the inmate of certain illegal activities. Some prisoners were accused of possessing weapons or ammunition, others with involvement in the planning and execution of one or more of the serious fires, and still others with trafficking in narcotics (Pet. App. 18, 24).

Individual classification hearings were held for the respondents in early November. Each respondent was

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[5] The facts of this statement are taken from the opinion of the district court (Pet. App. 16-20). The facts stated by the court were taken from a pretrial stipulation.

[6] The offenses charged were referred to the local district attorney for possible prosecution. In conformity with Massachusetts prison regulations no disciplinary proceedings were held. See Pet. App. 29, n. 1.

represented by counsel. The classification board opened each hearing by reading a prepared statement. The respondent was then ordered to leave the room while the board heard the informants' testimony, relayed by petitioner Superintendent Larry Meachum, after which the respondent was brought back into the room and informed that the informants' testimony supported the charges contained in the notice. The respondent was allowed to present evidence on his own behalf, and each denied involvement in the particular infraction charged. Several respondents also presented testimony and written statements on their behalf from corrections officers. The board also heard testimony from each respondent's social worker.

The board recommended that respondent Royce be placed in administrative segregation for 30 days, after which a second classification hearing would be held. The board recommended that respondents Fano, Dussault, and McPherson be transfered to Walpole, a maximum security prison, and that respondents DeBrosky and Hathaway be transferred to Bridgewater, a prison with both maximum and medium security sections. Respondents were not given a written statement of the board's reasons or of the evidence on which the board relied. They were orally informed that the recommendations were based upon information provided by informants. The information was not disclosed even in summary form, nor were the names of the informants provided.

The board's recommendations were reviewed personally by petitioner William Dawber, then Acting

Deputy Commissioner for Classification and Treatment, and by petitioner Frank Hall, Commissioner of Corrections. The board's recommendations as to respondents Fano, Dussault, Hathaway, and McPherson were accepted. Respondent DeBrosky was ordered to be transferred to Walpole instead of Bridgewater. Respondent Royce was ordered to be transferred to Walpole instead of being placed in administrative segregation.

Respondents were not subjected to disciplinary punishment upon arrival at their new prisons. They suffered neither loss of good time nor confinement in disciplinary segregation.

2. On December 12, 1974, respondents filed an amended complaint [7] in the United States District Court for the District of Massachusetts. It named as defendants Superintendent Meachum, Commissioner Hall, and Acting Deputy Commissioner Dawber, individually and in their official capacity. The complaint, brought under 42 U.S.C. 1983, charged that petitioners had violated the Constitution by placing respondents in segregation cells without prior notice

[7] On November 4, 1974, a civil rights action under 42 U.S.C. 1983 had been filed by 17 inmates at Norfolk. The complaint contended that plaintiffs' removal from the general population at Norfolk and their placement in administrative detention constituted punishment without due process of law and violated their rights under the Sixth and Fourteenth Amendments. The inmates sought a declaratory judgment, an order requiring Superintendent Meachum to return them to the general prison population, expungement from their records of any disciplinary reports, and punitive and compensatory damages.

and by transferring them to other institutions as punishment without adequate notice and hearing.[8] Respondents each sought $1,000 compensatory and $10,000 punitive damages, declaratory relief, and an injunction requiring petitioners to return them to Norfolk until more extensive hearings had been held.[9]

[8] Respondents sought to represent the class of all others similarly situated, but the district court declined to certify the case as a class action. Pet. App. 17.

[9] There is a substantial question whether this case is properly before the Court. The prisoners' civil rights action contended that procedures in effect throughout the Massachusetts prison system are unconstitutional. The amended complaint specifically attacked the adequacy of Departmental Order 4400.1. The district court also apparently concluded that Commissioner's Bulletin 82-1, which establishes procedures to be used before disciplinary boards, is defective because it extends those procedures to disciplinary segregation but not to transfers (Pet. App. 23).

Constitutional challenges seeking injunctions against state regulations of statewide applicability must be heard by district courts of three judges. 28 U.S.C. 2281. Many of the in-prison due process cases that have been considered by this Court have been heard on appeal from a three-judge district court. See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817; *Procunier* v. *Martinez*, 416 U.S. 396. (Other cases, such as *Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778, arose in *habeas corpus*; no injunction was sought.) In an exhaustive discussion of the applicability of Section 2281 to due process challenges to prison conditions and regulations, the Fifth Circuit has unanimously held *en banc* that in situations of this sort a three-judge court must be convened. See *Sands* v. *Wainwright*, 491 F.2d 417, certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992. Even if the practices under attack are "permitted" rather than "compelled" by the existing reg-

The district court held that petitioners' transfers exposed them to conditions of confinement significantly less advantageous than those they had enjoyed at Norfolk (Pet. App. 20). Concluding that the transfers were essentially disciplinary in nature (*ibid.*), the court held that petitioners were required to furnish respondents with pre-transfer hearings similar to those required by this Court (see *Wolff* v. *McDonnell*, 418 U.S. 539) for loss of good time credits accumulated under state law. The district court found that those procedures had not been observed here: (1) respondents were not given a summary of the information provided by the informants and relied upon by the classification board; and (2) respondents were not given a pre-hearing description of the nature of the alleged infractions adequate to allow them to prepare a defense.[10]

The district court entered a "preliminary order" directing petitioners to return respondents to the general population at Norfolk until they had been accorded a hearing in conformity with regulations then in force for disciplinary hearings at Walpole (Pet. App. 23). Petitioners also were ordered to promulgate regulations, to be reviewed by the court, establishing procedures that would govern future transfer hearings involving informant testimony[11] (*ibid.*).

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ulations, a three-judge court still would appear to be required. See *Sands* v. *Wainwright, supra*, 491 F.2d at 427-429; *Gilmore* v. *Lynch*, 400 F.2d 228 (C.A. 9), certiorari denied, 393 U.S. 1092; *McCarty* v. *Woodson*, 465 F.2d 822 (C.A. 10). Cf. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 292. But cf. *Phillips* v. *United States*, 312 U.S. 246. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

It may be that the practices followed in respondents' transfer hearings in Norfolk are not followed statewide. If that is so, a three-judge court would be unnecessary. *Wolff* v. *McDonnell*, 418 U.S. 539, 542, n. 1; *Board of Regents* v. *New Left Education Project*, 404 U.S. 541. The fact that institutions such as Walpole have adopted supplemental procedures for use by disciplinary (but not necessarily classification) boards (see Pet. App. 20-23, 35-36) may indicate the lack of a uniform statewide practice. On the other hand, the fact that the State's commissioner of corrections considers an appeal from a transfer decision in any prison may indicate that the practice is statewide. Neither the district court nor the court of appeals passed upon this matter.

However that may be, we do not pursue the questions further, for the federal government has no independent interest in their resolution.

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[10] Superintendent Meachum stated in an affidavit (Pet. App. 26) that giving respondents a more detailed description would have created a substantial risk of revealing the identity of the informants and would have placed their lives in danger. Meachum further stated that no fires had been set after the removal of respondents and others from the general population at Norfolk, and that he believed that if respondents were returned to the general population at Norfolk there would be a very great risk of further disruption.

[11] The court's order required these regulations to conform with existing regulations at Walpole and with the order of the court in *Daigle* v. *Hall*, 387 F. Supp. 652 (D. Mass.). The Walpole regulations, also known as Institution Order 4310, require that if testimony is taken in the prisoner's absence before a disciplinary board (but not a classification board), then the presiding officer must give the inmate a summary of the information in question and state the board's reason for such protective action (Pet. App. 21). In *Daigle*, the court held that before an inmate could receive a classification that resulted in an adverse change in conditions of confinement he must receive a *Wolff*-type hearing.

The district court scheduled a future hearing on the claim for damages and on the various claims of eleven other plaintiffs.

3. A divided court of appeals affirmed (Pet. App. 28-41). It held that transfers from medium to maximum security institutions involve such "significant modification of the overall conditions of confinement" as to affect "the 'liberty' protected by the Fourteenth Amendment" (Pet. App. 34) and therefore that prisoners may not be deprived of their interests in remaining in a particular prison without due process of law.

Turning to the question of what process is due, the court held that hearings should be similar to those required by *Wolff* v. *McDonnell*, *supra*, for loss of good time. Under that standard the hearings given respondents were held to be defective. The court rejected petitioners' argument that the informants' information had been withheld to protect the informants; it observed that because the State provides such information for disciplinary hearings at Walpole, it cannot "even in the exercise of the discretion recognized in *Wolff*" deny similar procedures to those imprisoned at Norfolk (Pet. App. 36).

Judge Campbell dissented (Pet. App. 37-41), disagreeing with the majority's conclusion that prison transfers affect a "liberty" or "property" interest of an inmate. In Judge Campbell's view, changes in conditions of confinement, such as those involved here, do not implicate "liberties" of a prisoner but "fall within the state's general right to confine, safeguard,

and rehabilitate" (Pet. App. 39), and since prisoners have no legitimate claim of entitlement to remain in a prison where they have been placed, proceedings leading to their transfer need not comply with the Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case should be controlled by the same principles that, we have argued, govern *Montanye* v. *Haymes*, No. 74-520, certiorari granted, 422 U.S. 1055. Both cases present the question whether the Due Process Clause applies to the transfer of a prisoner from one place of incarceration to another. Here, unlike the case in *Montanye*, respondents were transferred to institutions where they would be placed in closer custody. In our view, this distinction does not call for a different result. Our argument that the Due Process Clause requires no notice or hearing on the propriety of a disciplinary transfer is set forth in our brief in *Montanye*, and we summarize it here. We then discuss the differences between this case and *Montanye*.

1. The Due Process Clause applies only in those circumstances in which governmental action deprives an individual of "liberty" or "property." Thus an evaluation of respondents' claim must begin with an inquiry into whether respondents were deprived of liberty or property. This inquiry does not turn, as the court of appeals held, on the gravity of the deprivation, but rather looks to the characteristics of the asserted interest.

Removing a prisoner from a prison into which he has been placed does not deprive him of liberty.[12] He was deprived of his liberty upon conviction, sentence, and incarceration. The very fact of his conviction for a crime, and the legitimate placement of his person into the hands of a custodian who will be responsible for his safekeeping and the supervision of the most intimate details of his life, extinguishes any liberty interest he may possess in selecting his place of residence. The prisoner therefore is not deprived of his liberty by being moved from one prison to another.

The Constitution does not create a liberty interest in being free of the potentially less advantageous circumstances of a different prison, even if the difference amounts to "grievous loss." The conviction and authorized incarceration of any person entitles his custodian to expose him to at least that range of custodial conditions reasonably anticipated by the judge pronouncing the sentence, so long as those conditions do not independently violate the Eighth Amendment.

Certainly a prisoner has an "interest" in remaining in a prison the conditions of which he prefers to those of some alternative prison. But that interest is not constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" does not pertain to the day-to-day living conditions of persons lawfully confined. A prisoner's interests relating to the identity or physical location of his place of con-

[12] An expanded version of this argument appears at pages 14-30 of our brief in *Montanye*.

finement are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms and conditions of his confinement. His interests are no more expansive than those established by such statutes, regulations, and rules, and are more closely related to "property" than to "liberty."

This Court's decisions make clear that a legitimate claim of entitlement under a statute, regulation, or rule warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectations.

Under Massachusetts (and federal) law, the decision where to confine a prisoner is completely discretionary.[13] No set of facts respondents could prove or attempt to prove would entitle them to remain in an institution where they had temporarily been placed.

[13] The Bureau of Prisons "possesses the absolute authority, absent a showing of abuse of discretion, to designate the place of a prisoner's confinement and to administer transfer matters." *Clay* v. *Henderson*, 524 F.2d 921, 924 (C.A. 5).

Even if a prisoner were able to prove, in connection with a proposed disciplinary transfer, that he was innocent of any infraction of the prison's rules, prison officials still would retain discretionary authority to effect the transfer. Because decisions concerning institutional placement are not governed by any particular controvertible facts but instead are discretionary, respondents could under no circumstances have a legitimate claim of entitlement either to remain in one prison or to be moved to another. Accordingly, respondents have no constitutionally protected liberty or property interest in the place of their confinement; respondents' only "interest" is a hope or expectation to be confined in whatever prison he deems most advantageous to himself. But the Constitution does not require that any particular procedures be used before a State acts to disappoint an individual's unilateral expectations.

Nor does any constitutionally protected interest arise from the mere fact that a prisoner's transfer may be motivated by disciplinary considerations. Where "punishment" does not amount to a deprivation of constitutionally protected liberty or property, the procedural protections of due process do not apply.

2. Even when a prisoner has been deprived of a liberty or property interest, it is necessary to examine all interests at stake in order to determine how much "process" is due. We submit that even if a prisoner's transfer from one place of incarceration to another does implicate his liberty or property, the Court should hold that procedures less formal than notice

and opportunity for personal hearing are adequate to accommodate the legitimate interests of the prisoner and the competing interests of prison administration."[14]

If it were reasonably feasible to distinguish between a disciplinary transfer and a nondisciplinary or administrative transfer, it might be appropriate to strike the constitutional balance by providing the same procedural protections that are currently provided in connection with punitive sanctions such as loss of good time. See *Wolff* v. *McDonnell*, 418 U.S. 539. But disciplinary and administrative "reasons" are inextricably intertwined in most transfer decisions; a conscientious prison administrator, seeking to place a prisoner in the institution most likely to provide a satisfactory mixture of confinement, punishment, and rehabilitative opportunities, will of course consider the prisoner's record of behavior and compliance with prison rules. A distinction between disciplinary and administrative transfers therefore would be difficult to draw in practice, and even more difficult for the judiciary to administer on a case-by-case, *post hoc* basis, for in almost every prisoner's record there will be some incident upon which he could base a colorable claim that the transfer was intended to punish him. In short order, prison officials could well be compelled to adopt uniform and elaborate procedures for all transfers in order to mini-

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[14] An expanded version of this argument appears at pages 30-47 of our brief in *Montanye*.

mize disputes and litigation and preserve a semblance of order in decision-making. That result would, we believe, be most unfortunate, for there are compelling reasons, applicable to both administrative and disciplinary transfers, for allowing such decisions to be made informally.

The range of reasons for which an inmate may be transferred is quite broad. These include the initial classification decision to transfer an inmate to an institution apparently most suitable for the inmate; placement in an institution nearer the offender's release point; placement in an institution more appropriate to the length of time remaining to be served; placement in an institution containing more appropriate training or medical facilities; removal from an institution to which adjustment has been poor; transfers to reduce excessive population or increase deficient population; and removal for the safety of the transferred inmate or other inmates. Many of these causes for transfer do not turn upon objective inmate-specific facts of the sort most appropriate to trial-type determination. Some of them require only the determination of "legislative" facts with regard to which the inmate could offer little of importance. Others may offer appropriate occasions for entertaining the inmate's views, but these may be obtained without a formal adversarial hearing in every case. Other transfers are made because of suspicions that are incapable of objective proof in the particular case but nevertheless justify action.

Of course, even in many of the foregoing categories, inmate-specific facts may to some extent be relevant to the transfer decision, and hearings would on occasion operate to prevent a transfer prompted in part by a mistaken view as to those facts. But it is the judgment of prison authorities that the institutional costs of providing procedures to reduce the risks of mistakes of this sort outweigh the benefits to be derived from such procedures.

Provision of a trial-type hearing on every transfer occasion does not necessarily increase the welfare of prisoners as a group. It has been contended with some cogency that converting the relationship between the inmate and his custodian into a formally "adversarial" one may interfere with the rehabilitative goal of these institutions and make prison life more acrimonious than is otherwise necessary. Notice of the transfer may increase the probability that inmates, disappointed by the prospect and despairing of their ability to prevent it, may act violently toward their custodians or other inmates.

What is more, to the extent a hearing will operate to keep within a particular prison one who otherwise would leave, it also will keep out of the presumably "more desirable" institution one who otherwise would gain entry: one inmate's gain is another's loss. Finally, even when a specific disciplinary infraction is alleged, the hearing could not usefully explore the wisdom of making a transfer decision, for administrators retain discretion to transfer despite the lack of transgression. Accordingly, we submit, the Due

Process Clause should not be held to require notice and opportunity for a hearing when prison administrators do no more than allocate their charges to whatever prison, and for whatever constitutionally permissible reason, the administrators deem best for the prisoner and the prison system.

3. All of these arguments apply as well to transfers to more secure institutions. A prisoner is "deprived" only of the conditions he enjoyed prior to the transfer. If those conditions are not liberty or property, the Due Process Clause does not apply. Neither the court of appeals nor respondent has suggested any method by which the identity or security classification of the transferee prison can influence whether petitioner had a legitimate claim of entitlement to remain where he was once housed.

The court of appeals thought that a "liberty" interest was established because respondents were exposed to closer custody in the receiving prisons than at Norfolk. This confuses the inquiry into "grievous loss" (which is measured by the extent of the change in conditions) with the question whether the prisoner had a legitimate claim of entitlement to what was taken away. Only if he has such a claim is it necessary to address the subsidiary "grievous loss" question.

4. Nor is our analysis affected by the fact that transfers to maximum security institutions may affect the likelihood of respondents' being granted parole. An inmate's desire to be paroled in the future is itself neither liberty nor property, and therefore

the Due Process Clause does not apply to events that may disappoint the inmate's expectations.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE NOTICE AND OPPORTUNITY FOR HEARING ON THE PROPRIETY OF A TRANSFER OF A PRISONER BETWEEN INSTITUTIONS OF DIFFERENT SECURITY CLASSIFICATIONS

B. A Transfer to Closer Custody Does Not Deprive a Prisoner of "Liberty" or "Property"

The foundation for the holding of the court of appeals that transfers between institutions of different security classifications require procedural due process is its observation (Pet. App. 34) that such transfers involve "not a simple loss of privileges * * * but a significant modification of the overall conditions of confinement." The court held that respondents had been deprived of "liberty" because (Pet. App. 32) "the detriment worked by an intrastate transfer from a medium-security institution to a maximum-security prison is *serious enough* to trigger the application of due process protections" (emphasis added).

We submit that the court of appeals has confused the two inquiries essential in due process cases: first, whether a liberty or property interest is involved, and, second, whether the deprivation amounts to "grievous loss." The court of appeals appears to have believed that all deprivations involving a serious or grievous loss must, for that reason, affect a "liberty" interest. That is incorrect. "[T]o determine whether due proc-

ess requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (emphasis in original). See also *Goss* v. *Lopez*, 419 U.S. 565, 572-576.

The "*nature* of the interest at stake" is the same regardless of the destination of the transferred prisoner. He has been "deprived" of the conditions prevailing in the place where he used to be confined. That deprivation is the same whether he is transferred to another prison of the same security level or to a prison using greater security precautions. The *amount* of loss is greater in the latter case, but the *nature* of the loss is the same. For that reason, the presence or absence of a "liberty" interest in a continuation of residence at the old institution must be determined without regard to the identity of the receiving institution.

The test invoked by the court of appeals—"a significant modification of the overall conditions of confinement"—was derived from a footnote in *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 571-572, n. 19. That footnote compared the effects of deprivation of good time with those of imposition of solitary confinement. The Court concluded from this comparison that because solitary confinement "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct" (*ibid.*), the Constitution would require the same minimum procedural safeguards as are required for loss of good time. But the source of the prisoner's interest in avoiding solitary confinement was that the State had bound itself by regulations and a course of practice (as in *Perry* v. *Sindermann*, 408 U.S. 593) to impose solitary confinement only on account of misconduct. That practice created a legitimate claim of entitlement and, because imposition of solitary confinement would also create "grievous loss," minimum procedural protections were required.

The basis for a similar conclusion is lacking here—neither Massachusetts nor the federal government has bound itself by statute, rule, or settled course of practice to transfer a prisoner only because of misbehavior. Indeed, the contrary is the case. Most transfers within the federal system are for administrative rather than disciplinary reasons (see *Montanye* Br. 2-3, 38-41). A prisoner therefore has no reasonable expectation, and therefore no legitimate claim of entitlement, to remain in a particular prison unless and until he violates prison rules. Indeed, in this case the transfers of respondents appear to have been based upon "suspicion" rather than upon facts "proved" according to judicial standards. As we argued in *Montanye* (Br. 40-41, 45-47), the ability to make transfers "on suspicion" is a necessary part of the powers of prison administrators.

In the absence of some legitimate claim of entitlement on the inmate's part to remain in a particular prison, he has no liberty interest in doing so. The footnote discussion of solitary confinement in *Wolff*

is consistent with this analysis and does not support the judgment of the court of appeals.[15]

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[15] What is more, solitary confinement is radically unlike the normal confinement conditions in which a prisoner is placed. Its basic ingredient is isolation from human contact, an isolation that affects an inmate psychologically as well as physically. *Sostre* v. *McGinnis*, 442 F.2d 178, 190 (C.A. 2), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049. An inmate sent to solitary confinement usually cannot acquire good time, cannot possess property, cannot participate in any prison programs, is closely supervised, and his movement is curtailed. Solitary confinement thus produces a loss of freedom apart from that taken away by incarceration in general, in even the most secure institutions. In the federal system, an inmate can be placed disciplinary segregation (the federal equivalent of solitary confinement) only if he poses a serious threat to life, property, himself, staff, other inmates, or the security of the institution. Bureau of Prisons Policy Statement No. 7400.5D (1975). In view of the nature of solitary confinement it could be argued that it is so great a change in the quality of life, beyond whatever conditions were authorized by the original judgment of conviction, that it produces a loss of "liberty" even if there is no rule or settled course of practice reserving its use for prisoners who have violated the institution's rules.

Prison transfers to maximum security institutions do not implicate interests of similar magnitude. The major difference between medium and maximum security institutions in the federal prison system is in size and security. Most maximum security institutions are large and walled-in, while most medium security institutions are smaller and fenced-in. Housing in maximum security prisons is generally in multiple occupancy cell houses, although housing can also be in open dormitories and individual cells. Housing at medium security prisons varies considerably, both within and among institutions. Inmates may be housed in open dormitories, multiple occupancy cubicles, cells, or dormitory rooms.

A large percentage of inmates at maximum security institutions are confined in "close custody", while at medium security institutions a greater percentage of inmates are confined in "medium custody" or "minimum custody". Both types of institutions have inmates in all three custody levels. Maximum security institutions usually house older adults, those who have longer sentences, or those convicted of more serious offenses—that is, inmates who may be considered greater security risks.

In the federal system both types of institutions have an extensive range of programs available to inmates, including educational, vocational, recreational, group and individual counseling, and prison industries. In maximum security prisons the programs are more oriented to industrial work. A large percentage of the inmates in both types of federal institutions participate in these programs.

While transfers between institutions of different security levels thus may involve some changes in conditions of confinement, they do not occasion the type of changes in conditions of confinement created by solitary confinement.

Just as no "liberty" interest is implicated in the transfer of prisoners between prisons of different security levels, so a prisoner has no "property" interest in remaining in a particular place or a particular condition of confinement.

The court of appeals suggested (Pet. App. 34, n. 6) that the creation of a prison system containing institutions with divergent conditions of confinement is similar to the creation by the State of the good time credits involved in *Wolff*. We disagree. In *Wolff* the State had created by statute an entitlement to good time and had specified that good time was to be forfeited only for serious misbehavior. The creation of a prison system with institutions of various security classification is not analogous, because the State has not ordained any facts or set of facts that will entitle the prisoner to be placed in,

or to remain in, a particular institution. A good time credit system creates entitlements vesting in the inmate; the entitlements are revocable only when certain events come to pass. See 18 U.S.C. 4161 and 4165. A diversified system of penal institutions, on the other hand, is established so that the State can best attain its ends: incarceration, confinement, deterrence and (if possible) rehabilitation. Unless such a system is created with the provision that inmates are to be incarcerated at a specific level of custody and are not to be transferred except on the basis of certain determinable facts, no property right or legitimate claim of entitlement is created.[16]

The federal government has created no such claim of entitlement to a specific place or condition of confinement. The governing federal statutes (18 U.S.C. 4081 and 4082(b)) expressly grant federal prison officials full discretion over the placement and transfer of prisoners. See *Clay* v. *Henderson*, 524 F.2d 921, 924 (C.A. 5); *Moore* v. *Attorney General*, 473 F.2d 1375 (C.A. 5); *Holland* v. *Ciccone*, 386 F.2d 825 (C.A. 8), certiorari denied, 390 U.S. 1045. Congress has specifically declared that, for federal

[16] A number of courts have held that *any* change in the level of custody, even within an institution, must be preceded by a full *Wolff*-type hearing. See *Lokey* v. *Richardson*, C.A. 9, No. 74-1256, decided December 6, 1975; *Carlo* v. *Gunter*, 520 F.2d 1293 (C.A. 1); *Graham* v. *State Department of Correction*, 392 F. Supp. 1262 (W.D.N.C.); *Schumate* v. *People of the State of New York*, 373 F. Supp. 1166 (S.D.N.Y.). For the reasons discussed in the text and in our brief in *Montayne*, we submit that these cases were incorrectly decided.

prisoners, transfers shall not be conditioned on any particular set of facts. This, in short, is not a case like *Wolff* "where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits *accumulated under state law*, although those benefits were not mandated by the Constitution." *Goss* v. *Lopez*, *supra*, 419 U.S. at 573 (emphasis added).[17]

[17] At least one court of appeals has rejected an argument similar to the one we have made here, holding that it "attempts to resurrect the now-discredited right-privilege dichotomy as an analytical approach to due process * * *." *Cardaropoli* v. *Norton*, 523 F.2d 990, 995, n. 11 (C.A. 2). We submit that this characterization misconceives the thrust of our argument.

Under the right-privilege distinction, benefits created by substantive constitutional guarantees were "rights," and those created by statute were "privileges" subject to unfettered governmental control. A State could defend a claim that it had denied due process of law by answering that, because the State was not constitutionally required to give the benefit in question to *anyone*, plaintiff could not complain that he had not received it, no matter how arbitrary the State's decision and no matter what sort of discrimination the State may have practiced. Thus, even entitlements founded on statutory guarantees were not enforceable in practice.

The question whether there is a "liberty" or "property" interest—an inquiry established by the Constitution itself—is quite different. This Court held in *Roth*, *supra*, that "property" interests are founded only upon statutes, rules, or settled course of practice. The question in a case of this sort, therefore, is whether any statute, rule, or practice has created for the prisoner a legitimate claim of entitlement contingent upon specific facts. If it has done so, the Due Process Clause applies even though the entitlement may be a "privilege" that could be revoked at any time by altering the rules that created the entitlement. For example, one deprived of welfare is protected by the Due Process Clause. *Goldberg* v. *Kelly*, 397 U.S. 254. And if a State provides that any individual who is "unem-

B. The Fact That a Transfer May Later Be Taken Into Account in Making a Decision Whether to Release an Inmate Does Not Mean That the Transfer Itself Involves "Liberty" or "Property"

As a separate ground for its holding that a transfer deprives a prisoner of "liberty," the court of appeals observed that prison transfers may affect the likelihood of parole. This was based on an agreement reached by the parties that "determination[s] to transfer Plaintiffs, and the basis therefore, will be noted on their institutional record and will be considered by the Parole Board * * *" (Pet. App. 33). We submit, to the contrary, that the fact that transfers may be considered in making parole determina-

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ployed" shall be entitled to receive unemployment compensation, the expectation of benefits would be a property interest, because benefits would be contingent upon provable facts. An applicant for unemployment benefits therefore would be entitled to due process of law. Cf. *Geneva Towers Tenants Organization* v. *Federated Mortgage Investors*, 504 F.2d 483, 495-496 (C.A. 9) (Hufstedler, J., dissenting); *Raper* v. *Lucey*, 488 F.2d 748 (C.A. 1) (application for a driver's license). (What process would be "due" in these cases would depend, of course, upon the balance between the interests of the individual and those of the government.)

Under our argument, the applicability of the Due Process Clause turns not upon the *source* of the rule arguably creating a claim of entitlement, or upon the label attached to the claim, but upon whether there *is* a legitimate claim of entitlement—that is, whether any rule of law provides that inmate-specific facts entitle an inmate to remain in a particular prison or to defeat an attempt by his custodians to put him elsewhere. The right-privilege dichotomy depended upon the source of the rule in question; the inquiry into liberty or property looks to the nature of the entitlement created, and to whether there is a rule at all.

tions does not require that the transfer procedures comport with due process.

1. As we argued in our brief *amicus curiae* in *Weinstein* v. *Bradford*, No. 74-1287, vacated as moot, December 10, 1975, a prisoner's application for parole does not implicate the procedural protections of the Due Process Clause.[18] While a prisoner has an "interest" in being released on parole, that interest is neither "liberty" nor "property" until the release actually takes place. Prior to that time, the prisoner's desire to be released on parole is no more than a unilateral expectation on his part.

Denial of an application for parole does not deprive a prisoner of liberty. A prisoner is deprived of his liberty, for the full term of his sentence, upon conviction and incarceration. The prisoner who applies for parole stands in no danger of losing liberty; to the contrary, liberty is what he seeks. An adverse decision will merely continue him in his constitutionally valid confinement.

Nor does a prisoner have a property interest in parole, unless a State has made parole determinations that turn on certain determinable facts. Where parole is based on discretionary action (as it is in the federal system) no set of facts a prisoner could prove or

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[18] Copies of our brief in *Weinstein* are being furnished to the parties. The Solicitor General has authorized the filing of a brief as *amicus curiae* in *Scott* v. *Kentucky Parole Board*, No. 74-6438, certiorari granted, December 15, 1975, which presents the *Weinstein* issue.

attempt to prove would entitle him to parole. In such a situation there can be no legitimate claim of entitlement to be released on parole.

Since an application for parole therefore can be denied without a full hearing, it is permissible for the parole board to consider information generated without a full hearing.

2. Even if the Due Process Clause applies to the parole application process, prison transfers could be considered by a parole board whether or not the transfer decision had been made after a *Wolff*-type hearing. If the Due Process Clause applies to parole release decisionmaking, a prisoner applying for parole would have a full opportunity for an oral hearing and a right to a statement of reasons for the board's decisions. At the hearing he could challenge the propriety of the transfer decision [19] or the weight to be given to that decision.

Under regulations now in effect, the United States Board of Parole grants an inmate a hearing on his parole application. 28 C.F.R. 2.13 (1975). The prisoner is interviewed by the hearing officer and may offer evidence in support of his parole request. This hearing gives an inmate the full opportunity to explain or challenge any transfer appearing on his record. It is also the practice of United States Board

[19] We would argue, in an appropriate case, that a transfer decision made after a full hearing is not open to reexamination in a later parole hearing. Cf. *Morrissey* v. *Brewer, supra*, 408 U.S. at 490. But this argument is inapplicable where the prisoner was transferred without a hearing.

of Parole hearing officers fully to investigate transfers before taking them into account in making their parole determinations. The Constitution plainly does not require that facts that could influence parole be determined twice after full hearings; a single hearing should suffice.

This argument is consistent with the usual practice in parole release hearings. The parole board receives and considers evidence from all sources and of all degrees of reliability. The board considers hearsay, documentary evidence, and so on. The prisoner then is free to challenge the accuracy or value of that evidence and to present contrary evidence. The evidence is not inadmissible merely because it has been generated by procedures other than notice and an opportunity for hearing.

3. Finally, even if the possibility of an adverse effect upon parole applications is enough to indicate that the transfer decision affects liberty or property, it does not follow that the transfer itself is invalid unless preceded by a *Wolff*-type hearing. It is possible to eliminate the effect upon parole by expunging a prisoner's records. As Judge Campbell observed (Pet. App. 41), if an adverse effect upon parole is the constitutional harm to be avoided, the goal can be achieved by forbidding "the use of the fact of transfer by the parole board unless the charges upon which the transfer was based were established in a manner comporting with due process." The transfers themselves, however, would not be open to attack. Therefore, even if the potential effect upon

parole means that the transfer hearings furnished to respondents were inadequate, the court of appeals has selected the wrong remedy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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